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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1964

No. 355

BERNARD SUSSER, ET AL., PETITIONERS,

vs.

CARVEL CORPORATION, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED AUGUST 6, 1964
CERTIORARI GRANTED OCTOBER 26, 1964

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964

No. 355

BERNARD SUSSER, ET AL., PETITIONERS,

vs.

CARVEL CORPORATION, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 28206

Civil File No. 150-212

BERNARD SUSSER, GERTRUDE SUSSER and SHIRLEY SCHWARTZ,
Plaintiffs-Appellants,

against

CARVEL CORPORATION, CARVEL DARI-FREEZE STORES, INC., CARVEL STORES REALTY CORPORATION, EAGLE CONE CORPORATION, H. P. HOOD & SONS, Defendants-Appellees.

Civil File No. 152-119

LESTER N. MODICK and HARRIET M. MODICK,
Plaintiffs-Appellants,

against

CARVEL STORES OF NEW YORK, INC., CARVEL CORPORATION, CARVEL DARI-FREEZE STORES, INC., EAGLE CONE CORPORATION, H. P. HOOD & SONS, Defendants-Appellees.

Civil File No. 152-120

MARTHA M. McCOY and FRANK T. McCOY,
Plaintiffs-Appellants,

against

CARVEL CORPORATION, CARVEL DARI-FREEZE STORES, INC., CARVEL STORES REALTY CORPORATION, EAGLE CONE CORPORATION, H. P. HOOD & SONS, Defendants-Appellees.

Civil File No. 153-193

JAMES OSSOLA and ELIZABETH G. OSSOLA,
Plaintiffs-Appellants,

against

CARVEL STORES OF NEW YORK, INC., CARVEL DARI-FREEZE STORES, INC., CARVEL STORES REALTY CORPORATION, EAGLE CONE CORPORATION, H. P. HOOD & SONS, Defendants-Appellees.

Civil File No. 153-194

JOSEPH P. PHELAN, Plaintiff-Appellant,

against

CARVEL STORES OF NEW YORK, INC., CARVEL DARI-FREEZE STORES, INC., CARVEL STORES REALTY CORPORATION, EAGLE CONE CORPORATION, H. P. HOOD & SONS, Defendants-Appellees.

Civil File No. 60 Civil 63

JAMES P. PIERCE, RITA PIERCE, LYLE FREDERICK, LE ROY M. FREDERICK, ALFRED MUELLER and SOL RODENS, Plaintiffs-Appellants,

against

CARVEL STORES OF NEW YORK, INC., CARVEL DARI-FREEZE STORES, INC., CARVEL CORPORATION, CARVEL STORES OF PENNSYLVANIA, INC., CHAIN LOCATIONS OF AMERICA, INC., RAKESTRAW'S DAIRY PRODUCTS, INC., Defendants-Appellees.

Civil File No. 60 Civil 1096

MATTHEW SEU and JANE L. SEU, Plaintiffs-Appellants,

against

CARVEL CORPORATION, CARVEL STORES OF NEW YORK, INC., CARVEL DARI-FREEZE STORES, INC., CARVEL STORES REALTY CORPORATION, EAGLE CONE CORPORATION, H. P. HOOD & SONS, Defendants-Appellees.

Civil File No. 60 Civil 1990

PAUL S. GIBERMAN and GERTRUDE GIBERMAN, Plaintiffs-Appellants,

against

CARVEL STORES OF NEW YORK, INC., CARVEL DARI-FREEZE STORES, INC., CARVEHICLE CORP., CARVEL CORPORATION, CARVEL STORES OF PENNSYLVANIA, INC., CHAIN LOCATIONS OF AMERICA, INC., RAKESTRAW'S DAIRY PRODUCTS, INC., Defendants-Appellees.

Civil File No. 60 Civil 2042

JOSEPH PAZDRO and YOLANDA PAZDRO, Plaintiffs-Appellants,

against

CARVEL STORES OF NEW YORK, INC., CARVEL DARI-FREEZE STORES, INC., CARVEL CORPORATION, CARVEL STORES OF PENNSYLVANIA, INC., CHAIN LOCATIONS OF AMERICA, INC., RAKESTRAW'S DAIRY PRODUCTS, INC., Defendants-Appellees.

Appendix to Appellants' Brief

STATEMENT UNDER RULE 15(b)

The foregoing actions were instituted in the following order with the filing of complaints:

Susser on September 11, 1959; answer filed in behalf of Carvel corporate defendants on October 19, 1959; answer of H. P. Hood & Sons filed February 19, 1960;

Modick on October 27, 1959; answer of Carvel corporate defendants on November 25, 1959; answer of H. P. Hood & Sons on February 19, 1960; amended complaint filed May 18, 1961; answer of Carvel corporate defendants on June 12, 1961; answer of H. P. Hood & Sons on June 14, 1961;

McCoy on October 27, 1959; answer of Carvel corporate defendants on November 25, 1959; answer of H. P. Hood & Sons on February 19, 1960;

Ossola on November 30, 1959; answer of H. P. Hood & Sons on February 19, 1960; amended complaint filed May 18, 1961; answer of Carvel corporate defendants on June 12, 1961; answer of H. P. Hood & Sons on June 14, 1961;

Phelan on November 30, 1959; answer of H. P. Hood & Sons on February 19, 1960; amended complaint filed May 18, 1961; answer of Carvel corporate defendants on June 12, 1961; answer of H. P. Hood & Sons on June 14, 1961;

Pierce, record on transfer from Eastern District of Pennsylvania filed January 7, 1960; amended and supplemental complaint filed April 22, 1960; partial answer of Carvel defendants filed April 11, 1961; answers of all defendants filed June 7, 1961;

Seu on March 16, 1960; answer of H. P. Hood & Sons filed May 19, 1960; answers of Carvel corporate defendants on April 11, 1961 and April 25, 1961; amended answer of Carvel corporate defendants on June 7, 1961;

Giberman on May 17, 1960; answer of Carvel corporate and individual defendants on April 11, 1961 and June 7, 1961;

Pazdro on May 20, 1960; answer of Carvel corporate and individual defendants on April 11, 1961 and June 7, 1961.

All cases were referred to Judge Bicks for all purposes by orders entered January 19, 1960 and June 17, 1960 and subsequently, upon the withdrawal of Judge Bicks, to Judge Dawson for all purposes on December 19, 1960.

All actions were dismissed against Burry Biscuit Corporation by stipulation and order entered July 18, 1960.

The *Pierce*, *Giberman* and *Pazdro* actions were dismissed against Illinois Baking Corporation by stipulation and order entered July 18, 1960. Said actions were also dismissed against Richardson Corporation by stipulation and order entered December 30, 1960.[1]

Pre-trial order #2, filed September 22, 1961, directed a severance and separate trial of the fraud and antitrust actions.

Pre-trial order #5, filed February 8, 1962, directed that a joint trial of the issues of liability be tried separately from the issues of damages and that plaintiffs were relying solely on alleged *per se* violations of the antitrust laws and their evidence on the issues of liability would be limited to written agreements and other documents.

A joint trial was had before Judge Dawson without a jury on March 15, 19, 20 and 21 of 1962.

Judge Dawson's opinion (#27883), adverse to the plaintiffs, was filed June 8, 1962.

Plaintiffs filed notices of appeal on July 9, 1962 and amended notice of appeal on July 20, 1962.

The appeals were discontinued as against Mohawk Container Company, Inc. by stipulation and order filed August 16, 1962.

The appeals were also discontinued as against the individual defendants named in the *Pierce*, *Giberman* and *Pazdro* actions.

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

PERTINENT PARTS OF THE COMPLAINTS

The following extracts are from the *Susser* complaint:

(1053)* 38. That during the period encompassed and contemplated by this complaint and prior and subsequent

---

[1] These parties were named as defendants only in the *Pierce*, *Giberman* and *Pazdro* actions.

* CLERK'S NOTE: References to folios in this record are to the pages of the original record now on file with the Office of the Clerk of the Supreme Court of the United States.

thereto, defendants entered into an understanding and agreement wherein and whereby:

1. Defendants Mohawk, Eagle, Hood and Burry refused to sell their respective products to franchised dealers of Carvel defendants, including plaintiffs herein, at competitive or other prices;

2. Franchised dealers of Carvel defendants, including plaintiffs herein, were required and compelled to purchase the products of defendants Mohawk, Eagle, Hood and Burry from and through the Carvel defendants and at prices and upon terms fixed by the defendants;

3. The Carvel defendants designed the aforesaid franchise, similar to Exhibit "A" annexed hereto, so as to obligate and compel their franchised dealers, including plaintiffs herein, upon penalty of serious financial damage to deal solely and only with defendants Mohawk, Eagle, Hood and Burry;

4. Franchised dealers of Carvel defendants, including plaintiffs herein, could not and would not deal in competitive products;

5. The Carvel defendants could police their said franchised dealers to assure execution and compliance with the aforesaid agreements;

6. The Carvel defendants would terminate the franchise of any dealer or operator who failed to comply with the aforesaid agreements;

(1054) 7. Franchised dealers of Carvel defendants, including plaintiffs, herein, were required to resell the defendants' said products at prices fixed and determined by defendants.

39. The franchise agreement annexed hereto as Exhibit "A" was and is the means and device whereby the defendants carried out their aforesaid agreement.

The same allegations are repeated in *Modick* (4373-4374), *McCoy* (5093-5094), *Ossola* (8097-8098), and *Phelan* (9056-9057).

The following extracts are from the *Pierce* complaint:

(9850) 90. That during the period encompassed and contemplated by this complaint and prior and subsequent thereto, defendants entered into an understanding and agreement wherein and whereby:

(a) Defendants Mohawk, Illinois, Rakestraw, Burry and Richardson refused to sell their respective products to franchised dealers of Carvel defendants, including plaintiffs herein, at competitive or other prices;

(b) Franchised dealers of Carvel defendants, including plaintiffs herein, were required and compelled to purchase the products of defendants Mohawk, Illinois, Rakestraw, Burry and Richardson from and through the Carvel defendants and at prices and upon terms fixed by said defendants;

(9851) (c) The Carvel defendants designed the franchise, lease and other agreements hereto annexed and marked Exhibits "A" to "K" inclusive, so as to obligate and compel their franchised dealers, including plaintiffs herein, upon penalty of serious financial damage, to deal solely and only with defendants Mohawk, Illinois, Rakestraw, Burry and Richardson:

(d) Franchised dealers of Carvel defendants, including plaintiffs herein, could not and would not deal in competitive products;

(e) The Carvel defendants could police their said franchised dealers to assure execution and compliance with the aforesaid agreements;

(f) The Carvel defendants would terminate the franchise of any dealer or operator who failed to comply with the aforesaid agreements;

(g) Franchised dealers of Carvel defendant, including plaintiffs herein, were required to resell the defendants' said products at prices fixed and determined by defendants:

(h) Carvel defendants would institute legal action against their franchised operators who deal in competitive merchandise in order to enjoin such action;

(i) Carvel defendants would threaten competitive resources who sold to franchised dealers with local action.

91. That the franchise, lease and other agreements annexed hereto and marked Exhibits "A" to "K" were and are designed to secure and enforce faithful performance of the terms of the said agreements by plaintiffs and other (9852) Carvel operators, were and are the principal means and device whereby defendants implemented their said agreement and, through the use of force, duress and threats practiced on plaintiffs and others, carried out and continue to carry out the terms of their aforesaid agreement.

(9854) 101. That, the defendants, for the purpose of securing to themselves a monopoly in the products which they manufacture, distribute, handle, promote and sell, entered into, enforced, executed and implemented contracts and leases with plaintiffs herein and others and sold to them merchandise, supplies and equipment, on the express condition that the plaintiffs and others refrain from dealing in competitive products.

102. That the conduct of the defendants aforesaid has had the tendency, capacity and effect of substantially lessening and foreclosing competition in the products aforesaid.

(9856) 106. That the said franchise agreements are violative of the provisions of Title 15, § 14, U. S. C. A. in that the same provide for and constitute a sale or lease of merchandise on condition that plaintiffs refrain from purchasing, acquiring, selling or dealing in merchandise of defendants' competitors.

The following extracts are from the *Seu* complaint:

(11171) 53. That between the 17th day of March, 1956 and up to and including the present time, the said Carvel defendants have, by policing methods and through the use of force and duress, compelled plaintiffs to carry out the terms and provisions of the said franchise agreement and more particularly so much thereof as relates to the obligation on the part of plaintiffs to purchase and acquire merchandise and material for the operation of the franchise only from or through (11172) the said Carvel defendants.

54. That said franchise agreement, hereto annexed and marked Exhibit "A", is violative of the provisions of Section 3 of the Clayton Act in that it constitutes and is a sale or lease of merchandise on condition that the said purchaser refrain from using merchandise of competitors.

(11178-11179) Paragraphs 80 and 81 contain the same allegations found in paragraphs 38 and 39 of the *Susser* complaint (1053-1054).

The following extracts are from the *Giberman* complaint:

Paragraphs 84 and 85 (12269-12270) repeat the allegations of paragraphs 90 and 91 of the *Pierce* complaint (9851-9852); paragraphs 92 and 93 (12272) repeat the allegations of paragraphs 101 and 102 of the *Pierce* complaint (9854), and paragraph 101 (12275) repeats the allegations of paragraph 106 (9856) of the *Pierce* complaint.

(12274) 100. That on and from the respective dates on which plaintiffs entered into their said franchise agreements and up to and including the present time, the said defendants have, by policing methods and through the use of force, threats and duress, compelled the plaintiffs and others to carry out the terms and provisions of the said franchise agreements and, more particularly, so much thereof as relate to the obligation on the part of plaintiffs to purchase and acquire merchandise and material exclusively from or through the said defendants and to resell

same to the consuming public at prices fixed and maintained by the said defendants.

The following extracts are from the *Pazdro* complaint:

Paragraphs 50 and 51 (12920-12921) repeat the allegations of paragraphs 90 and 91 of the *Pierce* complaint (9850-9852).

Excerpts From Testimony

COLLOQUY BETWEEN COURT AND COUNSEL

[3143] The Court: What I am trying to find out is this: can we get this down to certain types of form agreements, I mean why introduce eight or ten franchise agreements if eight of the ten are all the same thing except for the names of the parties? Is there any form of agreement or forms of agreement that we can stipulate that were entered into?

[3144] Mr. Weisman: I believe that all those that are printed on yellow paper, and they, after 1955, are of the same contents.

• • • • • • •

The Court: Where is a typical franchise agreement entered into after 1955, then?

Mr. Roth: I have one here, if your Honor would like to look at our copy.

The Court: Let's see one from the plaintiffs.

Mr. Yarnell: Your Honor, this is one that was marked in the Pierce case.

[3145] The Court: Would you say that form of franchise agreement is the type of agreement which was entered into with every plaintiff after 1955?

Mr. Weisman: I would.

The Court: Except for the names of the parties, of course.

Mr. Weisman: Yes.

Mr. Yarnell: Your Honor, I think that rather than just a statement that it is typical of those with all the other plaintiffs, I would like a concession from Mr. Weisman that

this is typical of the franchise agreements entered into by the Carvel organization with all operators during the post-1955 period.

The Court: That is what I am telling you. So that instead of putting in 200 of these agreements, we have got one which is considered typical.

Mr. Yarnell: That is correct.

Mr. Weisman: Your Honor, I would say yes, reserving only to inform your Honor at the trial whether in recent years that may not concern our case, in terms of the latest plaintiff, there may have been some additional changes, but if there were, they were not with respect to any paragraphs, which as I understand [3146] the pleadings, have any materiality.

The Court: Then why don't we start marking some of these things?

I have here dealer's franchise agreement with James Pierce and Rita Pierce entered into on April 12, 1956. Can it be stipulated that this dealer's franchise agreement is typical of the dealer's franchise agreements entered into by the defendant Carvel with all their franchise operators subsequent to the year 1955?

Mr. Weisman: Yes, I would say that.

• • • • • • • •

[3149] Mr. Yarnell: Your Honor, now I would like to have the same type of concession with respect to the pre-1955 form agreements.

The Court: Have you got one?

Mr. Yarnell: Yes, your Honor.

• • • • • • • •

[3150] The Court: As to the four plaintiffs, then, prior to 1955, you will concede that is typical of the franchise agreements?

Mr. Weisman: Yes.

• • • • • • • •

OFFERS IN EVIDENCE

The Court: Well, all right, I will take it in evidence as Exhibit 2.

• • • • • • • •

[3153] The Court: * * * What is next?

Mr. Yarnell: The equipment sales contracts between Carvel and the plaintiffs, including the conditional sales agreements, your Honor.

The Court: Have you got that?

(Document handed to the Court.)

The Court: What particular part of this conditional sales contract do you claim is relevant to the [3154] issue in this case?

Mr. Yarnell: Your Honor, the back of the sales contract, which I have just handed you, has typed on it:

"The above franchise store equipment package is sold pursuant to franchise agreement contract No. 000350, dated February 11, 1953.

"It is specifically understood and agreed that the above equipment is sold subject to franchise contract entered into and between Carvel Stores of Pennsylvania, Inc. and the purchaser * * *."

I don't have to read the whole thing.

The Court: I see. Now, Mr. Weisman, is this the typical form of conditional sales agreement for equipment?

Mr. Weisman: Yes.

The Court: We will receive it in evidence, Plaintiff's Exhibit 3.

(Plaintiff's Exhibit 3 received in evidence.)

* * * * * * *

[3156] Mr. Yarnell: Exhibit 3 is February 11, 1963.

The Court: Is prior to 1955, is that it?

Mr. Yarnell: That is right.

The Court: Now, then, you are offering one that is subsequent to 1955?

Mr. Weisman: Yes.

The Court: Mr. Weisman, you will stipulate that this document which is Paul and Gertrude Gibberman, dated September 27, 1955, is the form of conditional sales contract used after 1955?

Mr. Weisman: We do.

The Court: All right, received in evidence as Exhibit 4.

* * * * * * *

[3157] The Court: What is next?

Mr. Yarnell: Your Honor, we next come to the Signs and Special Equipment Leases and Loan Agreements, and we there, too, have two forms. One is dated February 23, 1954, which I ask to be deemed representative of the earlier period.

The Court: Mr. Weisman, is this one, which is with Alfred Mueller, typical of the signs and loan agreement prior to 1955?

Mr. Weisman: I would say that this is substantially the way the Carvel people did business in that period with relation to signs and equipment.

The Court: All right.

Mr. Weisman: With respect to the lease and signs and equipment.

Mr. Yarnell: That is right.

The Court: All right, we will receive that in evidence and I will note the objection by the supplier defendant.

(Plaintiff's Exhibit 5 received in evidence.)

Mr. Yarnell: Now we have this one (handing to the Court).

The Court: This is one which is dated the 17th of March, 1956, with Matthew and Jane L. Seu. [3158] Is this the typical form of signs and special equipment lease used after 1955, Mr. Weisman?

Mr. Weisman: Yes, your Honor.

The Court: All right, received in evidence.

(Plaintiff's Exhibit 6 received in evidence.)

* * * * * * *

[3159] Mr. Yarnell: The next items, your Honor, are the location leases, subleases, assignments, conditional assignments of leases to Carvel.

The Court: What is their relevancy?

Mr. Yarnell: They have clauses in these various lease agreements and others making the leases contingent on the franchise and contingent on the operation by the operator of the stores in strict conformity [3160] with the requirements of the franchise agreements, and I think that, therefore, they are part of the—

The Court: Let me see one of them.

Mr. Weisman: Can I shorten this?

The Court: We can stipulate something.

Mr. Weisman: I will say that inasmuch as the real estate transactions themselves don't seem to be relevant, that all of those real estate transactions, what their form, and their forms vary, include a clause where the violation of the franchise agreement is also deemed automatically to be a violation of the real estate arrangement.

The Court: Isn't that sufficient for you?

Mr. Yarnell: Yes, your Honor.

The Court: All right, then, we don't need to put those documents in.

Mr. Yarnell: As I understand Mr. Weisman's suggestion, your Honor, he is stipulating that the leases form, in effect, an integral part of the franchise agreement to the extent that a violation of the franchise becomes grounds for termination of the lease automatically.

The Court: As I understand it, these franchise arrangements were made with different forms [3161] of real estate agreements. Some of them were leases. Some of them were assignments, and so on, but in all, as I understand Mr. Weisman's stipulation, whatever real estate rights the franchise owner had was conditioned upon his performing the franchise agreement, and that is really what you wanted to prove by those documents, so that is stipulated.

Mr. Yarnell: Yes, your Honor.

* * * * * * * *

[3162] The Court: We will take this conditional reassignment of lease, then, as typical of the arrangement that the franchise holders made with Carvel. Mark this as the next exhibit.

(Plaintiffs' Exhibit received in evidence.)

Mr. Yarnell: Your Honor, one of the things that we had listed here was the assignment of lease and assumption agreement that covered the type of situation which your Honor may recall from the fraud cases involved certain of the plaintiffs, including the Gibermans, where the land

either was owned by the operator, or, if there was a prior operator—

The Court: Then the assignment of lease and assumption agreement for the types of people who entered into that is a typical form, is it not, Mr. Weisman?

Mr. Weisman: It is.

The Court: Mark this 7-A.

(Plaintiffs' Exhibit 7-A received in evidence.)

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[3165] The Court: We will mark two exhibits. One is the SOP Manual prior to 1955 and the other is the SOP Manual post-1955, and I will ask the attorneys to get together and agree upon these documents so they can then be marked. We will reserve two numbers for those, 8 and 8-A.

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[3170] The Court: Can't you stipulate that when a franchise holder took out a franchise that Carvel furnished him with blueprints for the putting of a building and that those blueprints had a design patent on them?

Mr. Weisman: All right.

Mr. Klein: All right.

The Court: Mr. Weisman so stipulates.

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[3177] Mr. Klein: Will you stipulate that the product of the franchise dealer is absolutely a new product that is not delivered by Carvel?

Mr. Weisman: Yes.

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[3180] The Court: I think you are all wasting a lot of time in this thing. I haven't the slightest doubt in my mind from what I have heard previously on this that so far as Carvel is concerned, Carvel is engaged in interstate commerce in getting its supplies and in getting material which it used for the building of the franchise stores. Now, I don't think there will be any doubt as to that.

Why don't you pass this issue and this exhibit? [3181] If it becomes an issue later, why each side can go in and present all the proof they want on it.

Mr. Weisman: All right.

The Court: What is next? What are the next exhibits?

Mr. Yarnell: The next exhibits are the contracts with the supplier-defendants.

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[3186] The Court: This will be the next exhibit. A batch of agreements with Hood. Mark that the next exhibit.

Mr. Wilson: As just specified in the record.

(Plaintiffs' Exhibit 10 for identification received in evidence.)

The Court: What is the next thing?

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Mr. Yarnell: I have an Eagle Cone contract with the Carvel Stores of New York, Inc., dated May 1, 1955, which I would like to offer.

The Court: Any objection to this?

[3187] All right, this is the next one.

(Plaintiffs' Exhibit 11 for identification received in evidence.)

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[3189] The Court: All right, then this will be the next exhibit.

This is an agreement between Carvel Dari-Freeze Stores and Eagle Cone Corporation, dated May 1, 1955.

(Plaintiffs' Exhibit 12 received in evidence.)

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[3204] The Court: What is the next one?

Mr. Yarnell: The next one, your Honor, is May 14, 1956, between Carvel Stores of New York and Rakestraw's.

The Court: All right, these will be received in evidence.

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[3205] (Plaintiffs' Exhibit 15 received in evidence.)

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[3207] Mr. Yarnell: There is a May 11, 1959 letter, also, from A. Greene (sic) and Marciante to Gold Medal Products Company, dated May 11, 1959.

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[3209] (Plaintiffs' Exhibit 17 received in evidence.)

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[3210] Mr. Yarnell: The next is a letter dated June 15, 1959, from Agree & Marciante to National Biscuit Company.

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[3211] The Court: I will receive it in evidence for what it is worth.

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(Plaintiffs' Exhibit 18 received in evidence.)

Mr. Yarnell: Your Honor, the next document on our list is a letter from Agree & Marciante to the Dairymen's League. That is what we subpoenaed from Carvel, specifically by name, date and identification.

Mr. Weisman: We have the letter.

The Court: Where is the letter, is it here? Let's mark it.

Mr. Roth: We didn't bring it with us.

Mr. Weisman: Can you reserve a number?

The Court: Reserve a number from Agree & Marciante to the Dairymen's League, dated [3212] December 12, 1957.

(Plaintiffs' Exhibit 19 reserved.)

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[3217] The Court: What you mean to say is that Carvel brought proceedings against franchise holders who bought unauthorized material, is that right?

Mr. Yarnell: Yes, sir.

The Court: Isn't that what you want to establish by these documents?

Mr. Yarnell: Yes, your Honor.

The Court: Why can't that be conceded? I guess there is no doubt about it.

Mr. Weisman: What is that?

The Court: Where a franchise holder bought material from an unauthorized supplier of Carvel, that legal proceedings were instituted by Carvel in certain instances.

Mr. Weisman: In a number of cases. Very few related to the number of infractions or to the number of stores.

The Court: But legal proceedings were brought?
Mr. Weisman: Yes.
The Court: There you have a concession on that.

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[3224] Mr. Yarnell: The next one is a memorandum dated February 16, 1954, from Mr. Vettel.

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The Court: All right. We will receive it in evidence.

(Marked Plaintiffs' Exhibit 20 and received in evidence.)

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[3227] Mr. Yarnell: I have not located the first page of that letter of May 1 from A. Greene (sic) Marciante and I would like to have your Honor have that marked.
The Court: This, I think, was 16.

(Marked Plaintiffs' Exhibit 16 and received in evidence.)

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Mr. Yarnell: The next one, your Honor, is a letter dated December 12, 1956, signed by Thomas Carvel and sent to all Carvel franchise dealers.

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[3228] (Marked Plaintiff's Exhibit 21 and received in evidence.)

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[3229] Mr. Yarnell: The next is a New York Times advertisement. Sunday, April 6, 1958—
The Court: It is the same thing, isn't it?
Mr. Yarnell: It is not the same. Carvel stores have sold over 3 billion customer services to date. Three billion even in our present national budget is a substantial amount.
The Court: You mean they have had 3 billion customers?
Mr. Yarnell: No; it says up to that point [3230] they had sold over—they had had over three billion customer servicing or—
The Court: Every cone is a service?
Mr. Weisman: Yes.

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[3231] The Court: It might be an admission against interest of Carvel. I will receive it in evidence for what it is worth.

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[3233] (Marked Plaintiffs' Exhibit 22 and received in evidence.)

The Court: What is the next document?

Mr. Yarnell: The next one, your Honor, is the New York Times for Sunday, June 8, 1958, Carvel advertisement.

The Court: What is the relevancy?

Mr. Yarnell: This is offered on the question of volume, the fact that they had done over 3 billion customer services as of that date. Also the number of stores that over 500 successful Carvel franchise stores are now in operation. Also, with respect to the other item which I offered the other one for, as to "Carvel stores are delivered to you complete, including our own exclusive patented equipment, specual (sic) formula and product, training, supervision and merchandising and advertising methods."

The Court: We will take it for what it is worth.

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[3235] (Plaintiffs' Exhibit 23 received in evidence.)

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[3238] The Court: It will be stipulated that Mr. Vettel, who is vice-president of Carvel Stores of New York and president of Carvel Dari-Freeze Stores, Inc., in an affidavit dated October 10, 1959, made the statement that there are over 400 Carvel retail stores operating under dealers' franchise agreements and that these stores are located principally in nine or ten states and, to his belief, in eight or ten United States [3239] judicial districts. That is stipulated to.

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[3240] Mr. Yarnell: The next item is the affidavit of Martain Cain in support of Eagle Cone's motion for a summary judgment in the McCoy case.

• • • • • • •

[3245] Mr. Harriton: Am I correct in assuming that the whole document is now being admitted into evidence?

The Court: Yes.

Mr. Harriton: I have faith in the document.

(Plaintiffs' Exhibit 24 received in evidence.)

• • • • • • • •

[3250] Mr. Klein: They concede that there is a substantial volume of business; that the volume of business done is substantial; that the number of outlets is substantial and that the volume of business competitors are precluded from dealing with them, so then we have got the case.

Mr. Weisman: Yes, that is right, but the Judge is going to decide that.

The Court: I take it Mr. Weisman will stipulate that the volume of business done by the Carvel stores is substantial.

Mr. Weisman: I will produce the facts from which your Honor will exercise his prerogative to decide whether the volume of interstate commerce is substantial.

The Court: You produce those facts.

[3251] All right, now, what else?

Mr. Klein: I hope the Court will see to it that the actual facts are produced.

The Court: I will see that they are produced. Whether it is four million dollars or five million dollars, to my mind, doesn't mean anything. It is still substantial.

[3254] Mr. Yarnell: The next document is a bulletin to all the stores from Carvel Dari-Freeze Stores, Inc., dated August 18, 1954, and I am referring to the matter which is in the middle of the page with a mark in the margin.

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The Court: All right. Received in [3255] evidence.

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[3257] The Court: What is the next?

Mr. Yarnell: A bulletin from Carvel which bears a date at the bottom left-hand corner, 5/8/56, apparently to all dealers.

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[3258] The Court: All right. Receive that in evidence.

(Marked Plaintiffs' Exhibit 26 and received in evidence.)

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The Court: What is next?

Mr. Yarnell: A letter dated September 3, 1957, from Fred Vettel, Jr., which went to the entire chain.

* * * * * * *

The Court: Received in evidence for what it is worth.

* * * * * * *

[3259] (Marked Plaintiffs' Exhibit 27 and received in evidence.)

Mr. Yarnell: The next is Carvel bulletin No. 11, bearing a date at the bottom, 7/2/57. It is to all operators.

The Court: Where is this relevant?

Mr. Yarnell: Your Honor, one of the elements in this action is the price at which operators may sell and advertise their products and that they must be uniform. One of the means that we contend was used by Carvel to insure uniformity of pricing is their cooperative advertising program, where the operators were to use standard mats and standard forms of advertising and standard prices, and that the cooperative advertising credits were only given if the advertising was approved in advance by Carvel.

* * * * * * *

The Court: For such as it is worth, we will receive it in evidence.

* * * * * * *

[3263] Mr. Yarnell: The bulletin dated 5/2/56 from Carvel, and I call your Honor's attention specifically to the change suggested for page 15, Section J.

* * * * * * *

[3264] The Court: That we will receive in evidence for what it is worth.

* * * * * * *

(Marked Plaintiffs' Exhibit 29 and received in evidence.)

Mr. Yarnell: The next item, your Honor, is a bulletin, June 1, 1956, and I am particularly offering it, your Honor, for the two items marked with a clip.

The Court: Well, if you think that is helpful, all right, I will take it in evidence.

All right. This is received in evidence.

(Marked Plaintiffs' Exhibit 30 and received in evidence.)

* * * * * * *

[3267] The Court: What is next?

Mr. Yarnell: It is an undated Carvel bulletin which I believe is somewhere in May of 1956.

The Court: New price stickers. Will you please carefully offer the old price. Do a neat job and preserve your signs. All right. We will take it.

(Marked Plaintiffs' Exhibit 31 and received in evidence.)

* * * * * * *

[3270] Mr. Yarnell: Vol. 5, No. 11, Carvel bulle- [3271] tin dated 8/14/58, and I call your Honor's attention particularly to the item marked with a clip starting "Weekend special signs."

The Court: All right. Received in evidence for what it is worth.

(Marked Plaintiffs' Exhibit 32 and received in evidence.)

* * * * * * *

[3272] The Court: What is the next document?

Mr. Yarnell: A bulletin to all Carvel stores.

The Court: All right. Received in evidence for what it is worth.

(Marked Plaintiffs' Exhibit 33 in evidence.)

* * * * * * *

Mr. Yarnell: The January 2, 1958, letter from Thomas Carvel to all Carvel operators.

* * * * * * *

[3273] The Court: All right, we will receive it for what it is worth.

(Plaintiffs' Exhibit 34 received in evidence.)

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[3274] Mr. Yarnell: The next, your Honor, is a Carvel bulletin relating to the sixth annual store convention of the Carvel owners • • •.

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[3275] (Plaintiff's Exhibit 35 received in evidence.)

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[3276] The Court: What is next?

Mr. Yarnell: A Carvel bulletin dated March 14, 1960, with respect to the cooperative advertising of policy; that there must be prior approval to get credit.

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The Court: For what it is worth, I will take it. Same objection and same ruling.

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[3277] (Plaintiff's Exhibit 36 received in evidence.)

Mr. Yarnell: The next, your Honor, is a bulletin, Volume 7, No. 10, dated 3/8/60 of the same general nature.

The Court: Well, this is merely the preliminary to the cooperative advertising. All right, we will take it for what it is worth.

Mr. Wilson: Same objection on behalf of Hood.

(Plaintiffs' Exhibit 37 received in evidence.)

Mr. Yarnell: Another Carvel bulletin, Volume 6, No. 36, dated 10/12/1959.

The Court: You are offering this with reference to the item of price signs?

Mr. Yarnell: Yes, your Honor.

The Court: All right, we will receive it for what it is worth.

Mr. Wilson: Same objection on behalf of Hood.

The Court: Same ruling.

(Plaintiffs' Exhibit 38 received in evidence.)

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[3278] Mr. Yarnell: Now, your Honor, I would like to offer the next group of documents as a group because I think by seeing them in their totality your Honor will see their relevance rather than individually.

The Court: What are they?

Mr. Yarnell: These are all the signs, advertising literature, cut-outs, advertising layouts and menus and things like that which show the way in which the operator's prices were controlled. They all carry standard prices.

The Court: Well, let's see.

Mr. Weisman: Are these the actual advertisments or something from the SOP?

Mr. Yarnell: Some of them are window display signs. Some of them are menus.

[3279] Mr. Weisman: All right.

The Court: All right, for what it is worth, I will take it.

* * * * * * *

[3280] (Plaintiffs' Exhibit 39 received in evidence.)

* * * * * * *

Mr. Yarnell: * * * a letter dated May 24, 1956, from Carvel Stores of New York to Mr. and Mrs. Giberman.

* * * * * * *

[3281] The Court: All right, we will receive it for what it is worth.

* * * * * * *

(Plaintiffs' Exhibit 40 received in evidence.)

Mr. Yarnell: Letter dated July 17, 1958, from Carvell (sic) to Mr. and Mrs. Giberman.

The Court: Received in evidence.

(Plaintiffs' Exhibit 41 received in evidence.)

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[3283] The Court: What is next; and further documents?

Mr. Yarnell: Letter dated May 21, 1956, from Carvel to Giberman.

* * * * * * *

The Court: I shall receive it. Same ruling.
Mr. Wilson: Objected to on behalf of Hood.

(Plaintiffs' Exhibit 42 received in evidence.)

* * * * * * *

[3284] Mr. Yarnell: Letter dated September, 1958, from Carvel to Pierce.
The Court: All right, we will take that.

(Plaintiffs' Exhibit 43 received in evidence.)

* * * * * * *

[3226] The Court: Let me look at it.
This will be received in evidence as a letter from the firm of Agree & Marciante to the Dairymen's League Co-Operative Association, dated December 12, 1957.

(Plaintiffs' Exhibit 19 received in evidence.)

* * * * * * *

[3554] The Court: What is next?
Mr. Yarnell: A letter dated June 24, 1959, from Agree & Marciante to Mr. and Mrs. Lester N. Modick.
The Court: All right, received in evidence.

(Plaintiffs' Exhibit 47 received in evidence.)

The Court: What is next?
Mr. Yarnell: Next is a letter dated December 21, 1956 from Carvel Stores of New York, Inc. by Philip R. Franklin to Mr. and Mrs. James Pierce.
The Court: Received in evidence.

(Plaintiffs' Exhibit 48 received in evidence.)

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[3355] Mr. Yarnell: Yes, your Honor. This is a telegram from Carvel Stores of New York, Inc. to Mr. and Mrs. James Pierce.
The Court: This is a telegram which says to Mr. and Mrs. Pierce, "That the sale of Christmas trees from your Carvel store premises is a substantial violation of your franchise and lease and does substantial damage to Carvel stores. Demand is made that you immediately cease selling said Christmas trees."
Received in evidence.

(Plaintiffs' Exhibit 49 received in evidence.)

Mr. Yarnell: The next, your Honor, is a letter dated May 1, 1959 to Mr. and Mrs. Pierce from [3356] Carvel Stores of New York, Inc. by Robert J. Shallis. It is a two-page letter.

The Court: This letter tells Mr. and Mrs. Pierce that they are handling, selling and displaying and dealing in unauthorized non-Carvel products and ingredients, to wit, potato chips, peanut butter crackers, and unauthorized non-Carvel orange drinks, which are being dispensed from the Carvel fountain. They are also displaying certain red and green lights which are also unauthorized, and they demand that those things be stopped.

Received in evidence.

(Plaintiffs' Exhibit 50 received in evidence.)

* * * * * * *

[3358] Mr. Yarnell: The next is a letter dated July 21, 1958, from Carvel Stores of Pennsylvania by Robert E. Beardsley to Sol Rodens.

The Court: All right, received in evidence.

(Plaintiffs' Exhibit 53 received in evidence.)

* * * * * * *

[3361] Mr. Yarnell: The next item is a letter dated June 19, 1959, from Carvel Stores of New York, by Charles [3362] Marino, to Mr. and Mrs. Paul Giberman.

The Court: All right, received. That objects to their using unauthorized paper cups.

(Plaintiffs' Exhibit 57 received in evidence.)

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[3369] Mr. Yarnell: The next document, your Honor, is a letter dated September 2, 1958, from Carvel Dari-Freeze Stores to Mr. and Mrs. Frank McCoy with respect to Christmas trees.

(Plaintiffs' Exhibit 64, received in evidence.)

* * * * * * *

Mr. Yarnell: The next, your Honor, is a letter dated September 17, 1957, from Carvel Dari-Freeze Stores, Inc.

to Mr. and Mrs. Frank McCoy. That relates to equipment, your Honor.

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[3370] (Plaintiffs' Exhibit 65 received in evidence.)

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[3371] Mr. Yarnell: The next, your Honor, is a letter dated June 10, 1957, from Carvel Merchandise Division to Mr. and Mrs. James Pierce, with respect to a soft-drink bottle-dispensing unit.

The Court: They object to having the soft-drink bottle-dispensing unit. Received.

(Plaintiffs' Exhibit 66 received in evidence.)

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Mr. Yarnell: Next, your Honor, is a letter dated August 1, 1957, from Franklin & Agree to Mr. and Mrs. [3372] James Pierce.

The Court: Received in evidence.

(Plaintiffs' Exhibit 68 received in evidence.)

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[3377] Mr. Yarnell: This is a letter dated August 11, 1960 from Carvel Stores of New York, Inc. to Mr. and Mrs. Matthew Seu.

The Court: All right, received in evidence for what it is worth.

(Plaintiffs' Exhibit 72 received in evidence.)

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[3380] Mr. Yarnell: The next, your Honor, is a letter dated February 17, 1956 from Carvel Merchandising Division to Mr. Paul Giberman.

The Court: All right, received in evidence.

(Plaintiffs' Exhibit 75 received in evidence.)

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[3383] The Court: I take it that there is no dispute in this case that Carvel wrote letters to franchise operators who were selling what they considered unauthorized mer-

chandise such as bottled goods, dispensers they didn't supply, Christmas trees and ice cream not supplied by them. There is no dispute as to that. If they had a right to do it, they were all right. If they didn't have a right to do it, adding 50 more letters wouldn't change it.

• • • • • • •

[3384] Mr. Yarnell: This, your Honor, is to show the form and nature of the report made by the inspectors inspecting the various stores and the kind of things to which objections are raised.

The Court: All right, let me see it.

Received in evidence.

(Plaintiffs' Exhibit 76 received in evidence.)

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[3389] Here is a letter to Mr. Modick, dated August 23, 1957. I will receive this in evidence.

(Plaintiffs' Exhibit 79 received in evidence.)

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[3395] Mr. Yarnell: I would like to offer, your Honor, a Carvel Bulletin dated April 30, 1958.

The Court: Let me look at it.

Mr. Yarnell: Yes.

The Court: All right, received in evidence.

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[3396] (Plaintiffs' Exhibit 80 received in evidence.)

Mr. Yarnell: Another Carvel Bulletin dated May 21, 1958.

The Court: All right, received in evidence.

(Plaintiffs' Exhibit 81 received in evidence.)

Mr. Yarnell: A letter dated May 23, 1958 from Carvel Stores of New York, Inc. to Mr. Paul Giberman.

The Court: All right. I think this is a copy of something that is already in evidence, but if you want this in, we will take it.

(Plaintiffs' Exhibit 82 received in evidence.)

Mr. Yarnell: Carvel Bulletin, Volume 3, No. 4, dated 3/16/1956.

The Court: All right, received in evidence.

(Plaintiffs' Exhibit 83 received in evidence.)

* * * * * * *

[3420] Mr. Weisman: The total gross sales of ingredients and supplies ranged, beginning with the year 1954, from $2,738,255 to $3,965,923 in 1960. This excludes equipment.

If you include equipment the figure in 1954 is $4,383,001; in 1957 the total is $5,532,396, which is the highest, and in 1960 it was $4,460,689.

The Court: Do you have a figure for the total sales of all the franchise stores?

Mr. Weisman: We don't get those figures of all the franchise stores. I think reference has been made—on what well-informed basis I do not know—that in the aggregate the franchise dealers do about $10,000,000 of retail business; that is their retail business.

The Court: Do you think that is probably a fairly accurate figure?

Mr. Weisman: Well, I can say this, your Honor: That our sales of mix, restricted to mix, ranges from $1,972,352 in 1954, to a high in 1957 of $2,901,645, and down again to $2,611,324 in 1960, and from that I don't really see how you can get the $10,000,000 [3421] worth of sales in the retail stores. I think it was just a round figure estimate, but I would say that somewhere between six million and eight million is more nearly the figure that the retail stores do.

The Court: It is substantial.

* * * * * * *

[3422] Mr. Weisman: The highest number of stores, based on the exhibits in the fraud cases, in 1954 was 188 in the month of October; 259 in the month of [3423] September, 1955; and for the month of October, 1956, it was 314.

Mr. Yarnell: Your Honor, carrying forward from 1956 to the full period covered under the complaint, have there been decreases or increases?

Mr. Weisman: I think there have been increases.

The Court: Do you know approximately how many stores are open now, for example?

Mr. Weisman: If your Honor please, the only thing I heard is about 400, but Mr. Vettel, in the testimony that Mr. Yarnell says he is going to read, said 350 as of 1959, so that is the period of the complaint.

The Court: You figured that it is about 400?

Mr. Weisman: Between 350 and 400, I think.

• • • • • • •

[3425] Let me ask you one other thing on the interstate commerce. In how many states are there Carvel franchise stores, do you know?

Mr. Weisman: I think for the purposes of last fall there were nine or ten states. At one time or another they had stores in as many as—Carvel operations [3426] in as many as thirteen or fourteen.

The Court: But it runs between nine and thirteen or fourteen?

Mr. Weisman: I think the accurate figure now is nine states.

Mr. Yarnell: Your Honor, would Mr. Weisman concede that they are concentrated in the northeastern part of the United States, New York, New Jersey, Pennsylvania, Connecticut, Massachusetts?

Mr. Weisman: I am prepared to concede that and I know what I am doing, that I am trying to be fair about it, instead of trying to restrict it to the states from which the plaintiffs hail, namely, Pennsylvania, which is the largest ice cream consumer in the Union, Massachusetts and New Jersey, I would say the relevant market here would be New Jersey, New York, Pennsylvania, Massachusetts and Connecticut. Is that satisfactory?

Mr. Yarnell: Yes, your Honor.

The Court: Thank you.

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Excerpts From Transcript in Philadelphia County Action

[3430] Mr. Yarnell: Reading first from page 63 of the certified transcript of the proceedings in the Court of Common Pleas No. 7 Phfladelphia County. C P No. 7, June term. 1960. No. 145 in Equity.

It is entitled Carvel Stores of New York, Inc., a corporation versus James and Rita Pierce, Carvel Store No. 243, before Sloane, P. J.

Page 63, your Honor, the last question on that page:

"Q. In connection with your Illinois Baking Company resource, Mr. Vettel, do you tell them what size receptacle or cone they may deliver to the franchise store?

"A. The size of the cone itself?

"Q. Yes.

"A. Yes.

"Q. They cannot receive any other sizes?

"A. Who?

"Q. The franchised store owner.

"A. Yes.

"Q. He can?

"A. No, he cannot receive any other size.

[3431] "Q. You designate the size? Your company?

"A. Yes.

"Q. And if he went to Eagle—Illinois Baking Corporation, they would not be permitted to give him anything but the sizes that Carvel have designated? Let me rephrase it. He wouldn't be allowed to keep it, would he?

"A. No, and if he went to Eagle Corporation they wouldn't sell them to him. All cones that are manufactured for us are bought by us.

"Q. Eagle Cone Corporation is one of your resources? One of your sources of supply?

"A. We purchase from them, that is right.

"Q. But they do not ship into the State of Pennsylvania, do they?

"A. Not any more, no.

"Q. Because you tell them what territory they will deliver? Is that right?

"A. That is correct.

"Q. And Illinois Baking Company, you tell them in what territory they will sell?

"Q. Deliver, rather?

"A. Yes.

[3432] "Q. They may sell only to you?

"A. Yes."

* * * * * * *

[3503] FRED VETTEL, JR., called as a witness on behalf of Carvel defendants, being first duly sworn, testified as follows:

Direct examination.

By Mr. Weisman:

Q. Mr. Vettel, are you presently employed by the Carvel corporations?

A. Yes, I am.

Q. Any particular one?

A. I am employed by a variety of corporations.

Q. Will you please keep your voice up.

A. I am employed by a variety of the corporations.

Q. Which ones?

A. Carvel Dari-Freeze Stores; Carvel Stores of New York: Carvel Corporation: Carvel Stores of Pennsylvania and Carvel Stores of New Jersey.

Q. Are you an officer in each of these corporations?

A. I am.

Q. In what capacity are you employed?

A. I am the general manager of the Carvel organization.

* * * * * * *

[3504] Q. When did you become general manager?

A. In 1955 I believe.

Q. Just when, about?

A. In the early part of 1955; I think it was in either February or March.

* * * * * * *

[3527] Mr. Rothstein: I understood your Honor to have stated, and I am saying this on hearsay, that what was admitted in the fraud case is not automatically admitted here.

The Court: No, it is not.

* * * * * * *

[3528] Cross examination.

By Mr. Rothstein:

Q. Mr. Vettel, I am holding C-17 in my hand. Can you tell me when that was adopted by Carvel or first used?

A. You are referring to the particular form of this sign or the sign?

Q. That form of sign or that sign itself.

A. I couldn't tell you exactly, but it would be some time probably in 1957.

Q. I show you Exhibit C-16 and can you tell us when that particular type of sign was first used?

A. No, I would have to make the same guess. When we changed our policy the signs that we had in stock that had the prices printed on them, we bought overlays that could go over those prices.

. . . . . .

[3529] Q. What policy were you referring to which you said you made a change in policy?

A. The original policy was, prior to 1955, that the signs had printed prices on them and those were the only prices that were available.

Q. Was this the policy that was changed with respect to the furnishing of signs with printed prices?

A. The policy was changed and naturally with the change in policy we had to change the policy with regard to signs.

Q. What policy are you referring to that was changed other than the signs?

A. The change in the SOP that left the prerogative of prices up to the store owner.

Q. That was changed when?

A. In 1955.

Q. And that has continued down to the present day?

A. Yes, it has.

Q. And has a franchise owner since that change in 1955 always been free to set his own prices, is that right?

A. Yes, they have.

Q. That applies to all products dispensed at all these stores, ice cream products?

[3530] A. Yes, sir.

Q. How about cones?

A. Yes, sir.

Q. He could fix his own price on cones?

A. They do, definitely.

Q. And isn't it a fact that a store owner must maintain a 10-cent and 20-cent price on cones?

A. No, it is not a fact.

Q. You do not require that?

A. No, sir.

Q. Have you ever required a store owner to maintain a 10-cent and a 20-cent price on cones after you changed your price policy?

A. Not that I recall, no, sir.

• • • • • • •

[3532] Q. Carvel leases and does not sell the front-plate assembly to the store owner?

A. That is correct.

Q. That front-plate assembly is used on the freezer?

A. That is correct.

[3533] And the ice cream dispensed comes through that front-plate assembly, is that true?

A. Yes.

Q. That front-plate assembly is the thing which gives the swirl effect to the ice cream?

A. Yes, it does.

Q. Does Carvel have a patent on this assembly—has it not?

A. Yes, they do.

Q. Does Carvel license that patent to anyone, any other manufacturer of equipment?

A. I wouldn't know.

Q. Have you any knowledge of any other manufacturer of equipment selling a freezer with that type of front-plate assembly?

A. Do you mean identical to the one we have on ours?

Q. Yes.

A. No, I do not.

Q. That type of assembly must be used with the Carvel equipment in the Carvel store, must it not?

A. Yes, it must—not in the Carvel equipment.

Q. I accept the amendment. With equipment in [3534] the Carvel store.

A. That is right.

* * * * * * *

[3535] Q. You are correct. Carvel does have a patent on a refrigerated front display case, does it not?

A. I believe they do, yes.

Q. That refrigerated front display case is part of the equipment to be used in the Carvel store, is it not?

A. It may be, yes.

* * * * * * *

[3536] Q. After you made this revision in your policy in 1955 and about a year later, you sent out letters to storekeepers who had the early franchises?

A. I think it was a little less than a year but that is correct.

Q. You no longer considered those early franchises in effect, did you? And when I say you I mean Carvel.

A. We considered them in effect except that we didn't enforce those parts of the franchise described in the letter.

Q. Which related to prices?

[3537] A. To the prices, the equipment, the paper goods.

Q. Carvel has a board of governors, does it not?

A. Yes.

Q. That consists of whom?

A. Various store owners.

Q. And who appoints them as members of the board of governors?

A. The various corporations involved.

Q. You mean the Carvel corporations?

A. That is correct.

Q. And they are also removable at the will of the Carvel corporations, are they not?

A. I really don't know. I believe they are appointed for one year.

Q. Is it not so that this board of governors meets and makes recommendations for price changes for all stores?

A. No, they make recommendations for the change in the recommended level of price changes.

Q. How about the standard level, Mr. Vettel?

A. We don't have any any more.

Q. You have no standard prices?

A. No, we have only recommended prices.

Q. And you never used the term standard prices with [3538] reference to resale prices of the product?

A. We did at one time but that has long since been changed.

Q. When was that used?

A. I couldn't say definitely.

Q. When was it changed?

A. I would say some four or five or six years ago.

* * * * * * *

[3543] Recross examination.

By Mr. Rothstein:

Q. Do you recall the board of governors meeting at the St. Moritz Hotel on February 12, 1959?

A. Yes, I do.

Q. You attended that?

A. Yes, I did.

Q. Do you recall Mr. Wetmore?

A. Yes.

Q. Is he a Carvel dealer?

A. Yes, he is.

Q. Do you recall at that time, at that meeting, a letter from Mr. Wetmore being read with regard to the fact that the selling price on the logs should be $1.75 or $1.95; do you recall that?

A. I don't, but if I could look at the minutes I could refresh myself.

Q. I show you this document and ask you if you recognize this as a summary of the minutes of that meeting.

[3544] A. Yes, that is a summary of the minutes of the meeting.

Q. I believe you'll find what I was referring to on the third page, Mr. Vettel.

A. Yes.

Q. Do you recall that letter being read?

A. It must have been read or it wouldn't be in the minutes.

Q. Was action taken on that?

A. I imagine it was.

Q. Did you give Mr. Wetmore permission to raise the price to $1.75 or $1.95?

A. I don't recall. I'd have to refer to the file to find out how Mr. Wetmore's letter was answered.

* * * * * * *

[3545] The Court: No, he didn't ask permission. It says:

> "A letter from Mr. Wetmore was read with regard to the selling price on the log, which he recommended should be increased to $1.75 or $1.95."

Then it says:

> "It was generally agreed by the board of governors present that the recipe was not being followed since the average log weighed slightly less than two pounds and that the $1.50 selling price was more than ample for the ingredients and time concerned with the item."

* * * * * * *

[3564] The Court: Before we start with this witness, Mr. Weisman, there is one thing that puzzles me about this. Carvel had a restriction that nothing but Carvel mix could be dispensed through this machine with the Carvel spout or whatever it was on the front-plate assembly. I would like to get out in this evidence what makes Carvel ice cream unique. That is something not for you to answer, but a witness to answer. I think it is part of your case.

Mr. Weisman: I am not going to answer it, but I want to answer your question without giving any testimony.

The Court: I think while Mr. Vettel is still here you would be wise to get some proof on it because that is an important consideration.

Mr. Weisman: I think your assumption is not right. They are required in order to sell ice cream under the Carvel name to make it out of Carvel mix.

The Court: But why? I think you need some testimony on that. What is unique about Carvel ice cream?

Mr. Weisman: I think it is mentioned in the contracts but we will have some proof.

The Court: It simply says it is a secret [3565] formula. You should read the antitrust cases and you will see what I have in mind.

* * * * * * * *

[3566] WALTER SIMONSEN, called as a witness on behalf of defendant H. P. Hood, being first duly sworn, testified as follows:

Direct examination.

By Mr. Wilson:

* * * * * * * *

[3585] Q. Now, this ice cream mix is soft. Will you just tell us in your own way, from your rather abundant experience in the ice cream business, what is done with it in the production of these various frozen dairy products which are ultimately sold to the public; will you tell us that? How is it flavored and topped and whatever else is done with it?

A. In the soft form it is flavored, in the basic form.

Q. Where is that done?

A. At the stand.

Q. It isn't done at the Hood plant?

A. No.

Q. Please take it from there.

A. The customer receives the mix and he adds whatever flavor he wants to it, vanilla, chocolate, [3586] strawberry, coffee, and he puts it in the Carvel ice cream freezer and freezes it to the point that it is a semi-solid product, changit from a liquid, and in this form it is what we call in the industry soft served.

* * * * * * * *

[3588] Cross examination.

By Mr. Rothstein:

Q. Mr. Simonsen, I take it that any ice cream mix your company prepares must be made in accordance with regulations in the state in which it is being sold?

A. That is true.

* * * * * * *

[3593] Q. To your knowledge, are there many suppliers in the business that supply flavorings of this type to ice cream stores and others?

A. Yes.

Q. And, to your knowledge, based upon your experience in this business, are there a number of concerns which supply this particular flavoring and which is of good quality?

A. Yes.

* * * * * * *

[3608] Fred Vettel, Jr., recalled, having been previously sworn, testified further as follows:

Direct examination.

By Mr. Weisman:

* * * * * * *

[3610] Q. Do you have these fruit purees made to your specifications by processers of these products?

A. Yes, we do.

Q. Do you arrange as part of the transaction to purchase certain of the fruits at crop site; that is to say, at auctions similar to the way tobacco is sold?

A. That is part of our specifications, yes, sir.

* * * * * * *

[3616] Cross examination.

By Mr. Rothstein:

Q. Mr. Vettel, you have told us that there must be a favorable balance between the flavorings and the mix in order to produce a suitable product.

A. That is correct.

Q. That would hold true I assume for any ice cream mix, not only Carvel, isn't that so?

A. That is correct.

Q. Any ice cream mix sold in any non-Carvel store?

A. That is correct.

• • • • • • •

[3619] Q. Do you ever recall advising people who wrote you such letters of complaint that while you try to exercise a strict measure of control over your dealers you can't be there all the time and at sometime the dealer may not freeze it properly or mix it properly?

A. Yes, I do.

Q. So to a certain degree is it not so that the ultimate quality of the product will depend upon the man who is doing the job there in the store?

A. I would say that it would depend on the integrity of the man in the store, yes, inasmuch as we can't control whether he dilutes the product beyond our specifications.

Q. Also by integrity do you mean you can't control whether he follows your exact direction in mixing and freezing and the temperature?

A. If he doesn't follow it he would be diluting the product.

Q. This would not be a good product?

A. I beg your pardon?

[3620] Q. It would then result in a product not up to Carvel standards?

A. That is correct.

• • • • • • •

Q. It is your testimony that the nuts purchased by Carvel are superior to nuts that may be obtained elsewhere?

[3621] A. They are not superior to nuts that may be obtained of the same quality elsewhere but they are superior in quality to some of the nuts available from other sources, yes.

Q. Who determines this quality, Mr. Vettel?

A. We do.

Q. Do you know whether nuts of the same quality are obtainable from other suppliers, other than Carvel suppliers?

A. I would assume that they are.

Q. Would this apply to other items of topping such as cherries?

A. Yes, it would.

Q. In any case with reference to flavorings or toppings do you ever advise the store dealer of the Carvel specifications for these products?

A. No, we do not.

Q. Have you ever advised the Carvel store dealer that he can purchase those products from non-Carvel sources providing they meet Carvel specifications?

A. No, we have not.

Q. It is a fact, is it not, that Carvel does not permit that? A. We don't permit it because it would be [3622] impossible to police it, impossible to control it, it would be impossible in any way to determine whether each of the hundreds of dealers were following those specifications.

* * * * * * *

[3625] Q. And are Carvel suppliers of printed paper goods the only suppliers who produce this type of paper goods?

A. We supply the paper goods to the stores. We contract with various manufacturers of paper goods to manufacture the items that we specify.

[3626] Q. Do you know whether other than the manufacturers with whom you contract there are other suppliers who supply paper goods of a similar quality?

A. I would assume that there are, yes.

Q. Have you ever advised any of your operators of the specifications you require for printed paper goods?

A. No one has ever requested them.

Q. I asked whether you ever advised any of your operators of those specifications.

A. We never have, since no one has ever requested them.

* * * * * * *

OFFERS IN EVIDENCE

[3639] I would now like to offer what has been marked as Exhibit 8 for identification, and I understand there is agreement now between the Carvel counsel and our office that this represents the pre-1955 SOP.

Mr. Weisman: There is no agreement about it, but we do not object to the offer.

The Court: As the pre-1955 SOP?

Mr. Weisman: As the pre-1955 SOP.

The Court: All right, received in evidence.

* * * * * * *

[3655] Mr. Rothstein: I offer it in evidence. And, anticipating an objection, your Honor, I would like to tell you why and what portion. I am offering it with reference [3656] to the portion headed "Question 2" and followed by an answer. I will read that, your Honor, and why I consider it relevant.

"Question 2: There are many soft ice cream chains springing up but it seems that most of them use the same freezers. Who does Carvel buy their freezers from? Answer: When it comes to freezers, the same would hold as for franchises. Through actual field experience a custom-made (for Carvel stores) freezer has been developed by Carvel engineers. This freezer has been patented by us, and we are proud to say not only have we designed this, but we manufacture this in our own factory. No jobbers or distributors handle this. Carvel mechanics produce it from beginning to end. These freezers cannot be purchased by anyone other than a Carvel franchise store. Under no conditions are these freezers available to others."

[3657] The Court: All right, received in evidence.

Mr. Weisman: He read it, that is all he offered it for.

The Court: All right, we will consider it read in.

* * * * * * *

[3658] The Court: We don't have to have proof of the conspiracy between the Carvel corporations. I am regarding them as an entity. I will receive the letter for what it is worth.

(Plaintiffs' Exhibit 91 for identification received in evidence.)

* * * * * * *

IN UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Civ. 150-212

BERNARD SUSSER, *et al.*, Plaintiffs,

against

CARVEL CORPORATION, *et al.*, Defendants.

Civ. 152-119

LESTER N. MODICK, *et ano.*, Plaintiffs,

against

CARVEL STORES OF NEW YORK, INC., *et al.*, Defendants.

Civ. 152-120

MARTHA M. McCOY, *et ano.*, Plaintiffs,

against

CARVEL CORPORATION, *et al.*, Defendants.

Civ. 153-193

JAMES OSSOLA, *et ano.*, Plaintiffs,

against

CARVEL STORES OF NEW YORK, INC., *et al.*, Defendants.

Civ. 153-194

JOSEPH P. PHELAN, Plaintiff,

against

CARVEL STORES OF NEW YORK, INC., *et al.*, Defendants.

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60 Civ. 63

JAMES P. PIERCE, *et al.*, Plaintiffs,

against

CARVEL STORES OF NEW YORK, INC., *et al.*, Defendants.

60 Civ. 1096

MATTHEW SEU, *et ano.*, Plaintiffs,

against

CARVEL CORPORATION, *et al.*, Defendants.

60 Civ. 1990

PAUL S. GIBERMAN, *et ano.*, Plaintiffs,

against

CARVEL STORES OF NEW YORK, INC., *et al.*, Defendants.

60 Civ. 2042

JOSEPH PAZDRO, *et ano.*, Plaintiffs,

against

CARVEL STORES OF NEW YORK, INC., *et al.*, Defendants.

Appearances:

Greenfield, Rothstein, Klein & Yarnell, Esqs., of New York, N. Y., Attorneys for Plaintiffs; Sidney W. Rothstein, Esq., Jules Yarnell, Esq., Joseph L. Klein, Esq., of counsel.

Amen, Weisman & Butler, Esqs., of New York, N. Y., Attorneys for "Carvel" defendants; Herman L. Weisman, Esq., of Counsel.

Shearman & Sterling, Esqs., of New York, N. Y., Attorneys for defendant H. P. Hood & Sons, Inc.: John A. Wilson, Esq., of Counsel.

Schneider & Lichtenstein, Esqs., of New York, N. Y., Attorneys for defendant Mohawk Container Company; Charles Lichtenstein, Esq., of Counsel.

Albert L. Wigor, Esq., of New York, N. Y., Attorney for defendant Eagle Cone Corporation; Paul J. Harriton, Esq., of Counsel.

William G. Mulligan, Esq., of New York, N. Y., Attorney for defendant Rakestraw's Dairy Products, Inc.; Eve M. Preminger, of Counsel.

OPINION—June 7, 1962

DAWSON, *D. J.*:

I. GENERAL NATURE OF THE ACTIONS

These are nine separate cases which were consolidated for trial. By consent of the parties the trial was held without a jury.

The plaintiffs in all cases are persons who are or were operators, under franchise agreements, of Carvel Dari-Freeze Stores at which "soft" ice cream was sold. Defendant Carvel Corporation and its subsidiaries issued the franchises, sold the basic equipment needed for operation of the stores and performed other related functions.[1] The other corporate defendants in the actions are the suppliers of various products such as ice cream mix, cones and paper goods used in connection with the dispensing of soft ice cream.[2] Also named as defendants were certain individuals who are or were officers or employees of Carvel.[3]

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[1] The following subsidiaries of Carvel Corporation, a New York corporation, are defendants in these cases: Carvel Stores of New York, Inc., a New York corporation; Carvel Dari-Freeze Stores, Inc., a New York corporation; Carvel Stores Realty Corporation, a New York corporation, now known as Chain Locations of America, Inc.; Carvehicle Corporation, a New York corporation; and Carvel Stores of Pennsylvania, a Pennsylvania corporation. The name "Carvel" is used in this opinion as a general term of reference for any or all of the foregoing companie

[2] The non-Carvel corporate defendants consist of the following companies: Eagle Cone Corporation, a New York corporation;

individuals who are or were officers or employees of Carvel.[3]

The complaints in each of the cases set forth two fundamental causes of action. The first cause of action, based on a claim that the plaintiffs were induced to enter into their franchise agreements on the basis of certain fraudulent misrepresentations made by Carvel, was previously tried in a separate trial. The opinion of the Court which decided the fraud and deceit causes of action adversely to the plaintiffs was handed down on February 7, 1962. The present opinion relates to the second fundamental cause of action set forth in the complaints which claims treble damages for alleged violations of the antitrust laws on the part of the Carvel and the supplier defendants.

By the consent of all parties, as embodied in Pre-Trial Order No. 5, dated February 7, 1962, it was provided that a joint trial of the issues of liability under the antitrust laws be held, that the issue of liability be tried separately from the issue of damages, that plaintiffs were relying solely on alleged *per se* violations of the antitrust laws and that plaintiffs' evidence on the issue of liability would be limited to written agreements between the Carvel defendants and plaintiffs and other documents supplementary thereto or explanatory thereof, as well as written agreements between Carvel defendants and the supplier defendants and other documents supplementary thereto and explanatory thereof. At the trial, which was held in March, 1962, both sides relied primarily on documentary evidence to establish their case.

H. P. Hood & Sons, Inc., a Massachusetts corporation; Mohawk Container Company, Inc., a New York corporation; and Rakestraw's Dairy Products, Inc., a Pennsylvania corporation. The non-Carvel corporate defendants are referred to in this opinion as the supplier defendants.

[3] The actions as against these individuals, Thomas Carvel, Fred Vettel, Jr., George P. Clark, Robert J. Shallis, Agnes Carvel, Darrow Mutt, Ann M. McHugh, Stanley W. Townsend, Bruce Carvel, Mildred Arcadipane and Richard A. Cerosky, were dismissed by the Court on motion at the end of the case on the ground that no basis for any individual liability had been shown by the plaintiffs' evidence. The actions were also dismissed against Philip Agree and Arthur Marciante, former attorneys for Carvel.

II. Allegations of Unlawful Practices

In regard to the antitrust causes of action the complaints all contain certain common allegations. They allege that the defendants entered into an understanding and agreement during the period encompassed by the complaint and prior and subsequent thereto whereby:

1. The supplier defendants refused to sell their respective products direct to the Carvel franchise operators but would sell only through Carvel.

2. The Carvel defendants designed the franchise agreement so as to obligate and compel their franchise operators to deal solely and only with the supplier defendants.

3. The franchise operators were forbidden to deal in "competitive products," and

4. The operators were required to sell their products to the public at prices fixed by Carvel.

Rephrased in standard antitrust terminology, the complaint apparently alleges, as to the supplier defendants, a boycott under which they declined to make direct sales to the franchise operators. As to the Carvel defendants they are seemingly charged with (1) participation in the conspiratorial boycott against direct sales, (2) requiring, as a condition of obtaining the franchise and purchasing equipment, the use of the supplier defendants' products to the exclusion of the suppliers' competitors (tie-in), (3) forbidding the franchise operators from selling other than Carvel approved products (exclusive dealing), and (4) price fixing. These allegations will be taken up in order following a general discussion of the nature of the Carvel operation.

III. Nature of the Carvel Operation and the Franchise System

Thomas Carvel, an individual defendant in some of the actions and president of the Carvel Corporation, went into the ice cream business in 1934. Over the succeeding years Mr. Carvel developed a freezer for dispensing "soft" ice cream, an ice cream mixture about the consistency of frozen

custard. About 1948 the business established by Mr. Carvel had grown so substantially that two corporations, Carvel Corporation and Carvel Dari-Freeze Stores, Inc., were organized for the purpose of issuing franchises and selling freezers for the operation of soft ice cream stores under the Carvel name.

Thereafter, while the Carvel corporations operated some stores directly, most of their business related to the franchise operation. Each of the plaintiffs entered into agreements for the operation of a franchised Carvel Dari-Freeze ice cream store. The franchise operators conducted their businesses as independent contractors but were subjected to a number of restrictions which tended to create a uniform system of operation.

In some instances the franchisee erected his own store on premises subleased from Carvel. In other cases the franchisee leased a completed store as well as the land. All stores were constructed according to plans and specifications approved by Carvel. The ice cream sold by the stores is dispensed through certain machines designed by the defendants and bearing the Carvel name or trademark. The ice cream so dispensed is processed from an ice cream mix which the franchisee bought through Carvel from a dairy approved by Carvel. The mix is prepared from a special approved formula which was developed by Carvel and which is kept confidential by the dairies. Under the franchise agreements Carvel receives a royalty of twenty-five cents a gallon on the mix used in the machines.

The plaintiffs' franchise agreements require the franchisees to operate their stores in accordance with a Standard Operating Procedure Manual (SOP). This SOP regulates the business of the operators in a number of respects. It describes the products which the operators may sell at their store, the advertising which they may use, the color they must paint their store, the hours when they must put on their lights, the amount of insurance they must carry, the colors of their employees' uniforms, and many other details. To the public the individual franchise operator appears to be part of a national organization which manufactures and distributes a limited type of products of

uniform quality. The Carvel SOP refers to each store as "an integral part of the chain."

There are approximately 400 Carvel Dari-Freeze stores presently in operation, extending from Maine to Florida and as far west as Wisconsin. The stores do an estimated gross business of between six to eight million dollars annually. Carvel's sales to the stores of equipment, ingredients and supplies reached a high of $5,532,396 in 1957 and in 1960 totalled $4,460,689.

The operation of franchise stores, of which Carvel is an example, is a comparatively recent development. Franchise stores differ from the older established chain store operations in which the managers of the stores were not independent operators.

The franchise method of operation has the advantage, from the standpoint of our American system of competitive economy, of enabling numerous groups of individuals with small capital to become entrepreneurs. The franchise business has had a phenomenal growth in the ice cream industry. If our economy had not developed that system of operation these individuals would have turned out to have been merely employees. The franchise system creates a class of independent businessmen; it provides the public with an opportunity to get a uniform product at numerous points of sale from small independent contractors, rather than from employees of a vast chain. The franchise system of operation is therefore good for the economy.

However, the cornerstone of a franchise system must be the trademark or trade name of a product. It is this uniformity of product and control of its quality and distribution which causes the public to turn to franchise stores for the product. This is well illustrated in the Carvel operation. The individual franchise to a dealer permits him to manufacture and sell Carvel ice cream from a store of uniform and distinctive design that has as an integral structural feature the Carvel crown and cone trademark erected on the roof as a prominent identifying mark. All stores are also identically unique in that they have a flat, slanting roof, the front portion of the building consists only of glass walls and the name "Carvel" is displayed

on each side in the form of neon signs over twelve feet in length and nearly three feet high. The building and the distinctive appurtenances thereto are protected by a design patent issued to Thomas Carvel. The ice cream is made and dispensed from a patented machine. Where the ice cream product which is sold to the public is such as would be placed in a paper container the name "Carvel" is written in script on the face of the container. Where it is necessary to provide a spoon with the ice cream product, as in the case of a sundae, the spoon used is distinctive and unique in design, with the Carvel crown and cone at the end or top of the handle and the name "Carvel" written in distinctive script on the handle of the spoon.

It is this uniformity of stores and operation, and this advertising and the knowledge of the public of the uniformity and quality of the product that draws the business to the Carvel operators. The name Carvel constitutes a trademark of great value to the defendant companies and to the franchise operators.

It is well established that the owner of a trademark may license its use to another without abandoning his trademark. However, a naked license agreement without supervisory control over the product is invalid. *E. I. du Pont de Nemours & Co.* v. *Celanese*, 167 F. 2d 484, at p. 489 (C. C. P. A. 1948). The obligations of the trademark licensor were well expressed in *Morse-Starrett Products Co.* v. *Steccone*, 86 F. Supp. 796, at p. 805 (D. C. N. D. Cal. 1949):

> "• • • If the owner of a trademark wants to license the use thereof to another and still retain as his own the enjoyment of the rights stemming therefrom, he must do so in such a way that he maintains sufficient control over the nature and quality of the finished product, over the activities of the licensee, as will enable the licensor to sustain his original position of guarantor to the public that the goods now bearing the trademark are of the same nature and quality as were the goods bearing the trademark before the licensing, or, that the mark now has the same meaning as far as the public is concerned as it did before the licensing."

The validity of the franchise agreements and the other agreements between Carvel and the operators must be judged in the light of this fundamental rule relating to the protection of trademarks and trade names.

As was stated in *Coca-Cola Co.* v. *J. G. Butler & Sons*, 229 Fed. 224, 232 (D. C. Ark. 1916):

> "* * * The trademark laws, like the patent laws, give the owner a monopoly which neither the Sherman Act nor any other act of Congress forbids. It would be a paradox to say that the exercise of a right, expressly granted by law, is unlawful."

IV. Liability of the Supplier Defendants

The plaintiffs' case against the supplier defendants rests almost entirely upon the legality of the contracts of the supplier defendants with Carvel. The contracts are not uniform, but certain provisions are common to them, and the general charges made by plaintiffs are the same as respects all the supplier defendants.

The liability of the supplier defendants is predicated upon alleged unlawful conspiracies on the part of each of the supplier defendants with Carvel not to sell direct to the plaintiffs. The plaintiffs do not contend that the supplier defendants engaged in any common conspiracy with Carvel and with each other in furtherance of any illegal end. No evidence of any such conspiracy was offered; the plaintiffs relied on the agreements between Carvel and the supplier defendants to establish the unlawful conspiracies.

The contracts of the two dairy companies involved in this action, H. P. Hood & Sons, Inc. ("Hood") and Rakestraw's Dairy Products, Inc. ("Rakestraw"), are substantially similar. Hood and Rakestraw each agreed to manufacture and sell to Carvel all the "Carvel Mix" required by Carvel dealers located in the respective geographical areas to be serviced by each of them.[4] Carvel agreed to purchase from

[4] Hood delivered Carvel Mix to the stores of the plaintiffs in Massachusetts and Connecticut and Rakestraw made deliveries to the plaintiffs located in Pennsylvania.

the dairies all of its requirements of Carvel Mix for such stores. The supply contracts provided that Hood and Rakestraw should manufacture Carvel Mix according to a secret formula furnished by Carvel and that they would not disclose the formula to any unauthorized persons. In addition, Hood and Rakestraw agreed to "deliver only Carvel Mix to Carvel Stores, and no other ice cream mix or ice cream preparation of any kind." Deliveries of Carvel Mix were made by the dairies direct to the franchise operators.

It is difficult to see exactly what plaintiffs consider to be the illegality of the dairy companies' contractual arrangements with Carvel. The complaint alleges that the supplier defendants violated the antitrust laws by their refusal to deal direct with the plaintiffs. There is no allegation in the complaint that the provisions of the contracts under which the dairies agreed to furnish all of Carvel's requirements for Carvel Mix were illegal in themselves, and the plaintiffs failed to prove that such provisions were in fact illegal. See, *Tampa Electric Co.* v. *Nashville Coal Co.*, 365 U. S. 320 (1960); *United States* v. *Columbia Steel*, 334 U. S. 495 (1948).

As to the alleged refusal to deal direct, certainly the plaintiffs had no right to purchase Carvel Mix, made pursuant to Carvel's secret formula, other than on the terms which Carvel prescribed. Carvel had the right to bind the dairy companies to manufacture this secret formula mix solely for its own use or for persons whom it might designate. No outsider or any of the plaintiffs, without Carvel's approval, had the right to require the dairy companies to sell them this special formula mix. This conclusion seems obvious.

The same conclusion applies to the contracts of the two other supplier defendants, Eagle Cone Corporation and Mohawk Container Co. Eagle Cone Corporation agreed to supply all of Carvel's requirements for certain special ice cream cones for the operators located in New York, Connecticut and Massachusetts. The Mohawk Container Co. contract was an agreement to sell in a six state territory certain paper products of an exclusive design which would be ordered by Carvel. These contracts were not shown

to be in any way illegal, still less illegal *per se*. See *Bascom Launder Corp.* v. *Telecoin Corp.*, 204 F. 2d 331 (2d Cir.), *cert. denied*, 345 U. S. 994 (1953).

As a second possible basis for liability, the plaintiffs appear to rely on the fact that the supplier defendants would not sell them ice cream mixes other than the Carvel Mix (in the case of the two dairy companies) or other than Carvel approved merchandise (in the case of the other supplier defendants). As previously mentioned, the Hood-Carvel supply contracts provided that Hood would deliver no ice cream preparation other than Carvel Mix to Carvel stores and the Rakestraw contracts contained similar provisions.[5]

Plaintiffs' argument that these provisions are illegal must fail for several reasons:

First, the argument assumes the illegality of Carvel's restrictions on using only Carvel Mix and other approved products in the franchised stores—an assumption that is rejected in a subsequent section of this opinion.

Secondly, the plaintiffs failed to prove that any of the supplier defendants were asked to make sales of unapproved merchandise and that they refused to do so.

Thirdly, even if the supplier defendants agreed with Carvel not to sell other than Carvel approved products to the franchise operators, such an agreement by two persons not in competition with each other would not have constituted an illegal boycott. *Packard Motor Car Co.* v. *Webster Motor Car Co.*, 243 F. 2d 418 (D. C. Cir.), *cert. denied*, 355 U. S. 822 (1957); *Schwing Motor Car Co.* v. *Hudson Sales Corp.*, 138 F. Supp. 899 (D. Md.) *aff'd per curiam*, 239 F. 2d 176 (4th Cir. 1956), *cert. denied*, 355 U. S. 823 (1957).

Finally, the plaintiffs made no showing that they could not obtain non-Carvel merchandise from other suppliers

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[5] The contracts of Eagle Cone Corporation and Mohawk Container Co. contained no provision that these companies would not sell the operators non-Carvel approved merchandise and the plaintiffs failed to prove that any such policy existed independent of the contracts.

or that the refusal of the supplier defendants to sell them such merchandise deprived the plaintiffs of any access to these goods.

In conclusion, plaintiffs' evidence failed to make out any illegal conduct on the part of the supplied defendants and the case against them must therefore be dismissed.

V. Validity of Requiring the Use of the Supplier Defendants' Products to the Exclusion of Others

In considering the particular violations of the anti-trust laws charged against Carvel, it is necessary to distinguish between the arrangements that Carvel had with its operators prior to May 1, 1955, and the agreements entered into after that period. In 1954 the Federal Trade Commission made an investigation of Carvel's method of conducting its business. No complaint was ever issued and no formal hearings were ever held before the Federal Trade Commission. However, Carvel retained counsel to review the manner of conducting its business operations and, on their advice, it revised its franchise agreements and other documents in a number of respects. Therefore it will be necessary to examine Carvel's method of doing business prior to May 1, 1955, as well as its present method of doing business. The plaintiffs in the Susser, McCoy, Mueller and Frederick cases entered into their franchise agreements prior to May 1, 1955. The plaintiffs in the other cases[6] all entered into their agreements after May 1, 1955.

The complaints allege that the Carvel defendants designed the franchise agreements to compel the franchise operators to deal only with the supplier defendants. The restrictive provision in the franchise agreements entered into prior to May, 1955 was as follows:

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[6] Modick, Ossola, Phelan, Pierce, Rodens, Sue, Pazdro and Giberman. (The cases involving the plaintiffs Pierce, Mueller, Frederick and Rodens, which were begun in the Eastern District of Pennsylvania were consolidated before being transferred to this court. This accounts for the reference to twelve names of plaintiffs in the nine cases covered by this opinion.)

"4. The Operator does hereby agree during the life of this Franchise Contract as follows:

* * * * * * *

(c) To purchase only Carvel Special Formula Mix from a source of supply designated by Carvel.

(d) To purchase from Carvel all equipment necessary for the operation of the Store at Carvel standard prices and to pay for same on terms as agreed between the parties hereto in separate Sales Contract attached hereto and made part hereof.

(e) To purchase and use only standard Carvel approved printed paper goods, napkins, cones, extracts, spoons, and all other Carvel products at standard market prices."

The post-1955 franchise agreements contain the following provisions:

"SIXTH: In order to safeguard the integrity of the Carvel trade-marks, the Dealer agrees that he will purchase from Carvel or from approved sources designated by Carvel, his entire requirements of Carvel's Frozen Dairy Product mix, toppings, flavorings and other ingredients, cones and any other items sold as a part of the end product that is offered for consumption to the retail purchaser as scheduled in the Standard Operating Procedure Manual. * * *.

* * * * * * *

NINTH: In connection with the operation of a Carvel Store and to comply with the specifications set forth in the Manual, the Dealer is required to purchase various items of machinery and equipment, and paper goods, a list of which is set forth in the Manual. To the extent that Carvel is able to supply the same, the Dealer shall have the right to purchase such machinery, equipment and paper goods, if he so desires, from Carvel, at prices fixed by Carvel from time to time. The Dealer's obligation under this paragraph is satisfied so long as the Dealer equips his store and keeps

it maintained in accordance with the specifications contained in the Manual. In the event that the Dealer desires to purchase his printed paper goods from sources other than Carvel, Carvel shall license manufacturers of such products to print the Carvel name thereon in connection with sales to the Dealer, with products made in accordance with Carvel standards."

The first problem to be considered is whether Carvel may lawfully require the franchise operators who purchase freezers[*] from Carvel "to purchase only Carvel Special Formula Mix from a source of supply designated by Carvel." In this respect the pre-1955 agreements and the post-1955 are substantially similar. The sources of supply which Carvel designated were various dairies, two of which, Hood and Rakestraw, are defendants in these actions. The provision in the franchise agreements which operates to obligate the dealers to purchase Carvel Special Formula Mix from these defendants is attached by the plaintiffs as an unlawful tie-in under Section 1 of the Sherman Act and Section 3 of the Clayton Act, 15 U. S. C. §§ 1, 14.

It is doubtful whether Section 3 of the Clayton Act is applicable to the kind of restriction here involved. Section 3 prohibits restrictions in sales or leases preventing the use of goods or other commodities of "a competitor or competitors of the lessor or seller." Since Carvel, which has imposed the restriction, does not itself manufacture ice cream mix, it is doubtful whether dairy companies produc-

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[*] It is not altogether clear in Carvel's arrangements with its operators what the tying device may be considered to be and what product or products are alleged to be tied in. Logically the franchise, which is basic to the entire operation, or the dispensing freezers sold by Carvel, would seem to be the tying articles with the mix and accessory products tied in. Plaintiffs in their post trial brief do not assert that the franchise is a tying device but advance the theory that in addition to the freezers the front assembly plate for the freezers (which happens to be patented and which is leased to the operators) is a tying article. This attempt to bring in an incidental patented article as a tying device as to which "dominance" may be presumed is unrealistic and cannot be accepted. This opinion proceeds on the basis of plaintiffs' other contention that the dispensing freezers sold by Carvel are the tying articles.

ing ice cream mix can be considered "competitors" of Carvel so as to bring Section 3 into application. However, it is unnecessary to resolve this question since the arrangement here involved is not of the type which could be held illegal under the provisions of either Section 1 of the Sherman Act or Section 3 of the Clayton Act.

The plaintiffs rely on a number of cases in which various tie-in arrangements have been held illegal under the antitrust laws. It is true that "tying agreements fare harshly under the laws forbidding restraints of trade." *Times-Picayune Publishing Co.* v. *United States*, 345 U. S. 594, 606 (1953). The following cases illustrate types of tie-ins which have been condemned. *United Shoe Machinery Corp.* v. *United States*, 258 U. S. 451 (1922) (lease of patented machines on condition that leased machinery should not be used with shoes upon which certain other operations had not been performed on other machines of the lessor and on condition that lessee should purchase supplies exclusively from the lessor); *International Business Machines Corp.* v. *United States*, 298 U. S. 131 (1936) (lease of patented tabulating machines on condition that lessees should use with such machines only patented tabulating cards also manufactured by the lessor); *Mercoid Corp.* v. *Mid-Continent Investment Co.*, 320 U. S. 661 (1944) (use of patent license to tie in unpatented elements); *International Salt* v. *United States*, 332 U. S. 392 (1947) (lease of patented salt machines on condition that all salt consumed in the machines be purchased from lessor); *Northern Pacific Ry. Co.* v. *United States*, 356 U. S. 1 (1958) (sale of land with preferential routing conditions); *United States* v. *General Motors Corp.*, 121 F. 2d 376 (7th Cir. 1941) (requiring purchasers to deal with finance companies controlled by the automobile manufacturer).

The plaintiffs are unable to bring themselves under these cases for a number of reasons.

First of all, none of the cases in which tie-ins were held illegal involved the sale of products to the public under the trademark of the person imposing the restriction. The right of the franchisees to use the Carvel trademark was undoubtedly a valuable property right which, because it had been extensively advertised, and was associated with

a particular product, had generated considerable good will. It is well settled that the licensor of a trademark not only is justified in imposing restrictions on his licensee but, indeed, is obligated to do so in order to make the license a valid one. See, *e.g.*, *Arthur Murray, Inc.* v. *Horst*, 110 F. Supp. 678 (D. Mass. 1953) (license to use name "Arthur Murray" conditioned upon agreement to employ only dancing instructors trained in the "Arthur Murray method"). In *The Coca-Cola Bottling Co.* v. *The Coca-Cola Co.*, 269 Fed. 796 (D. Del. 1920) it was held that an agreement to buy Coca-Cola syrup exclusively from the manufacturer and, in consideration of the right to use the Coca-Cola trademark, not to sell substitute or imitation products, was not violative of the Clayton or Sherman acts.

The rationale of these latter cases applies here. Carvel, which had developed a secret formula for ice cream mix, was justified in requiring the operators to use this mix in making sales to the public under the Carvel name. The end product which was sold to the public *was Carvel ice cream*, and it was this product to which the Carvel trademark and good will attached. The restrictions imposed by Carvel fall within the permissible limits approved in *FTC* v. *Sinclair Refining Co.*, 261 U. S. 463 (1923). In that case Sinclair, a refiner of gasoline, leased underground tanks and gasoline pumps to retail dealers on the condition that the equipment should be used only with gasoline supplied by the lessor. The Supreme Court held that no violation of the Clayton Act was involved.[5]

In *Times-Picayune Publishing Co.* v. *United States*, 345 U. S. 594, 607 (1953), the Court explained the significance of the *Sinclair* case by pointing out that there "the arrangement merely prevented lessees from dispensing other types of gasoline through the lessor's brand pumps and was thus viewed as a means of protecting the good-will of the lessor's branded gas." On the authority of the *Sinclair* case it is clear that Carvel has the legitimate right to require that only its special formula mix be dispensed from the ma-

[5] See Standard Oil Co. v. FTC, 273 Fed. 478, at 481 (2d Cir. 1921)—"It is unfair and dishonest to give out from a pump bearing one brand another maker's oil * * *."

chines and equipment sold to the franchise operators which bear the Carvel trademark. See also *Pick Mfg. Co.* v. *General Motors Corp.*, 80 F. 2d 641 (7th Cir. 1935), *aff'd per curiam*, 299 U. S. 3 (1936), in which a contract of an automobile manufacturer with a dealer that the dealer would not sell or use in the repair of any of the manufacturer's vehicles any part not manufactured or authorized by the automobile manufacturer was held not to violate the antitrust laws.

As regards the accessory products such as toppings, cones and paper goods, these products are so closely related to the ice cream mix that Carvel is entitled to designate approved sources of supply as the franchise agreements provide. To require Carvel to limit itself to advance specifications of standards for all the various types of accessory products used in connection with the mix would impose an impractical and unreasonable burden of formulation and policing and is not required by the antitrust laws. It is to be noted however that the agreements indicate that Carvel would approve the use of accessory supplies from alternate sources of supply if an adequate check on standards could be maintained. In this there is no violation. See *Standard Oil Co. of California* v. *United States*, 337 U. S. 293, 306 (1949). There was no indication that Carvel reaped any profit itself from any of the tie-ins.

In any event, it is plain that the restraints in the nature of tie-ins which are attacked by the plaintiffs cannot be declared *per se* illegal, which is the only type of illegality on which the plaintiffs rely. The extent to which tie-ins may be regarded as *per se* illegal under the antitrust laws is far from clear. See Turner, "Validity of Tying Arrangements Under the Antitrust Laws," 72 Harv. L. Rev. 50-75 (1958). Certainly in this case no *per se* illegality was demonstrated. The plaintiffs made no showing, as ordinarily required under the cases, that Carvel occupies a dominant position as a franchisor of soft ice cream or seller of ice cream freezers, or even that a substantial amount of commerce in the "tied" products was foreclosed. In the absence of these facts there is no basis for recovery. *Times-Picayune Publishing Co.* v. *United States*, 345 U. S. 594 (1953).

VI. Prohibition of Sale of Non-Carvel Products

The franchise agreements entered into prior to May 1955 provided in Paragraph 4 that the operator agreed

> "(a) To maintain, conduct and operate a Carvel Store at the premises hereinafter mentioned conforming in all respects to the Carvel Methods, Operating Techniques and Standards and to sell therein only frozen dairy products established as standard products in Carvel Stores. All operating techniques and standards shall be subject to change by Carvel upon notice to Operator.
>
> (b) That all merchandise purchased in said Store shall be under the Carvel label, established as such by Carvel, and Operator is to refrain from selling or dealing in any other products unless otherwise designated by Carvel."

The franchise agreements entered into after May 1955 provide that.

> "The Dealer agrees to sell at the Carvel Store, Carvel's Frozen Dairy Product solely in accordance with the (Standard Operating Procedure) Manual and will sell no other product except as hereinafter expressly otherwise provided."[9]

The allegation that the franchise operators are prohibited by the foregoing provisions from dealing in other than Carvel products on their store premises presents a separate problem from that of tie-ins, although such "exclusive dealing" involves related issues and has also been attacked under Section 3 of the Clayton Act as well as other antitrust laws.[10] There is no dispute that Carvel enforced

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[9] Both forms of franchise agreement permitted the operator to install one soft drink cup dispensing machine and one cigarette vending machine at the outside of the store only.

[10] As with tie-ins, a number of cases have held certain kinds of exclusive dealing arrangements to be illegal. Standard Fashion Co. v. Magrane-Houston Co., 258 U. S. 346 (1922) (agreement requir-

the exclusive dealing provisions by notifying certain of the franchise operators to discontinue selling unauthorized merchandise and, in a few instances, brought suits to enjoin such violations of the franchise agreements.

Any consideration of the legality of Carvel's exclusive dealing arrangements with the franchise operators must involve an appraisal of the effect of the decision in the *Standard Stations* case, *Standard Oil Co. of Calif.* v. *United States*, 337 U. S. 293 (1949). The contracts involved in that case required the dealer to purchase from Standard all his requirements of one or more products, and in the fields which they covered, petroleum products and accessories, competitors were effectively excluded. These arrangements were held illegal.

There are several facts here which distinguish the position of the Carvel franchise operators from that of the dealers involved in the *Standard Stations* case. A distinction must be drawn first of all between the requirement that the franchise operators not sell competing brands of ice cream and the prohibition that the franchise operators not sell other types of products, such as hamburgers and coffee, completely outside the competitive ice cream line. The latter type of restriction was not involved in the *Standard Stations* case, nor could such a restriction be held illegal under Section 3 of the Clayton Act since there is no competition between Carvel's products and products outside the ice cream field. Section 3 of the Clayton Act prevents a seller or lessor from prohibiting his purchaser or lessee from dealing in the goods of "a competitor or competitors of the lessor or seller," but this prohibition is not applicable to Carvel's restriction on the sale of goods outside the ice cream line since Carvel is not competing with such goods.

No case has been found under any of the antitrust laws holding that the franchisor of a valuable trademark cannot

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ing purchaser of dress patterns not to deal in patterns of the seller's competitor; FTC v. Motion Picture Advertising Service Co., 344 U. S. 392 (1953) (contract prohibiting showing of competitors' films); Dictograph Products v. FTC, 217 F. 2d 821 (2d Cir. 1954), cert. denied, 349 U. S. 940 (1955) (restricting hearing aid dealers from selling products of competitors).

restrict the line of the business operated by his franchisee. Carvel is in the business of franchising ice cream dealers and should not be forced by the operators to enter into or lend its name to other lines of business. Naturally any food products sold on the premises in a store of uniform specifications and displaying the Carvel sign would be attributed to Carvel. Any defects in quality, over which Carvel would have no control, would detract from the Carvel name and good will. Carvel is not, by these restrictions, taking any business for itself at the expense of its competitors and no injury to competition is shown.

The problem of whether the dealers may lawfully be prohibited from selling ice cream products which compete with the Carvel line is a closer question, in view of the decision in *Standard Stations*, but even here there are reasons why Carvel's restrictions should be sustained. The factual situation involved here is different from that in *Standard Stations* where the agreements "contained provisions which, both by the language used and the limitations of liability, stressed the character of the agreement as seeking to establish the dealer as an independent contractor." *United States* v. *Standard Oil Co.*, 78 F. Supp. 850, 855 (S. D. Calif. 1948) *aff'd*, 337 U. S. 293 (1949). The dealers were little more than wholesale purchasers of Standard's products and they were not part of a closely controlled franchise operation where the operators function in many respects as an integral part of the entire Carvel operation. Standard Oil's method of operation was to sell its own products to its dealers, but the ice cream mix and accessory products which, as a technical matter, are sold through Carvel, are not produced by Carvel. Carvel is in the business of franchising stores; it is not in the business of manufacturing ice cream mix, cones or napkins. The exclusive dealing provisions as to these products are aimed primarily at control of quality and are not part of a design by Carvel to monopolize business in any of these fields. Under these circumstances the exclusive dealing provisions in Carvel's franchise agreements are not violative of the antitrust laws. See, *Pick Mfg. Co.* v. *General Motors Corp.*, 80 F. 2d 641 (7th Cir. 1935) *aff'd per curiam*, 299 U. S. 3 (1936); *Boro Hall Corp.* v. *General Motors*

Corp., 124 F. 2d 822 (2d Cir. 1942); *cf.*, *Arthur Murray, Inc. v. Horst*, 110 F. Supp. 678 (D. Mass. 1953).

As a practical matter, it may be noted that there is no evidence that the Carvel operators are particularly interested in selling other kinds of ice cream. The testimony that was given during the trial of the fraud aspect of these cases indicated that the operators were more concerned with expanding their line of business into other fields than with selling additional brands of ice cream.[11]

In any event, since the plaintiffs have voluntarily limited themselves to *per se* violations, they cannot succeed in their attack upon the exclusive dealing provisions in the franchise agreements. It is plain that exclusive dealing provisions, although they may be illegal under certain circumstances, are not illegal *per se*. *Bascom Launder Corp v. Telecoin Corp.*, 204 F. 2d 331 (2d Cir.), *cert. denied*, 345 U. S. 994 (1953). They can only be held illegal if, within a relevant market, they substantially lessen competition. The plaintiffs, presumably in accordance with their *per se* theory of illegality, offered no evidence as to the relevant market nor did they show that competition was substantially lessened. On this record the plaintiffs have not made out a case for relief.

VII. Validity of Pricing Provisions in the Franchise Agreements

The challenged pricing clause in the franchise agreements used *prior to May 1955* required the operator "to maintain prices on products designated in, and as per Carvel Standard Operating Procedure and not to conduct any reduced price sales of these items without written consent from Carvel." Section "J" of the pre-1955 SOP provided for certain stated "standard selling prices" which were established by Carvel. Section "K" of the early SOP, entitled "General Information," contained the following sentence: "In the event that you plan a special sale or promotion other than those planned by your company, it is neces-

[11] One complained of his inability to sell hamburgers; one complained that he could not use the premises to sell Christmas trees.

sary to secure permission to sell merchandise at a price below the standard permitted." These provisions show clearly that the prices at which ice cream was sold to the public were set by Carvel and not by the operators.

It has been established beyond any possibility of dispute that agreements fixing prices are illegal *per se* under Section 1 of the Sherman Act. *Dr. Miles Medical Co.* v. *John D. Parke & Sons Co.*, 220 U. S. 373 (1911); *United States* v. *Trenton Potteries Co.*, 273 U. S. 392 (1927). "Where such restraints are established, in purpose or in effect, inquiry under the Rule of Reason ends." *Report of the Attorney General's National Committee to Study the Antitrust Laws*, 12 (1955).

The facts of the present case afford no basis for approval of Carvel's policies under the doctrine of *United States* v. *Colgate & Co.*, 250 U. S. 300 (1919), since here there is no unilateral refusal to deal but a direct agreement between the defendant and its franchisees setting the prices at which ice cream products may be sold. The defendants do not attempt to justify their agreements under state or federal fair trade laws: presumably because they recognize that no "resale" product is involved.

Carvel does urge that its pre-1955 price restrictions on its franchisees should be upheld as ancillary to the license of its trademark and the lease of the patented front plate for the dispensing machine. The contention is made that the price agreements should be sustained by extension of the principle announced in *United States* v. *General Electric Co.*, 272 U. S. 476 (1926), where it was held that a patentee who grants a license to make, use and sell the patented articles might fix the sales price "provided the conditions of sale are normally and reasonably adapted to secure pecuniary reward for the patentee's monopoly." 272 U. S. 476, 490. The defendant relies for authority on *Straight Side Basket Corp.* v. *Webster Basket Co.*, 82 F. 2d 245 (2d Cir. 1936) to support the extension.

In the present state of antitrust law the defendant is unable to justify its actions under those cases. Insofar as the *Webster* case extended the principle of the *General Electric* case to permit prior fixing of unpatented products of a patented machine it must probably be regarded as

unsound. *Darber-Colman* v. *National Tool Co.*, 136 F. 2d 339 (6th Cir. 1943); *Cummer-Graham Co.* v. *Straight Side Basket Corp.*, 142 F. 2d 646 (5th Cir. 1944); *American Equip. Co.* v. *Tuthill Bld'g Nat'l Co.*, 69 F. 2d 406 (7th Cir. 1934). Indeed, the *General Electric* doctrine itself is of such uncertain continuing validity that any extension of it at this time must be regarded as unwarranted. See *United States* v. *Line Material Co.*, 333 U. S. 287 (1948). The fact that the ice cream mix may have been made with a secret formula is of no consequence. *Dr. Miles Medical Co.* v. *John D. Parke & Sons Co.*, 220 U. S. 373 (1911).

The cases outlawing price fixing have been so sweeping that there would appear to be room for saying that even in as closely controlled a franchise situation as Carvel maintains, price fixing may be justified as ancillary to a valid business operation. While variable prices in different stores might conceivably jeopardize Carvel's good will and trademark interests, it is plain that absent any claim of statutory protection under the fair trade laws the price fixing provisions in the pre-1955 agreements must, under well-established case law, be held illegal. The fact that in 1955 Carvel radically changed these provisions of its agreements, presumably on the advice of counsel following the FTC investigation, shows that Carvel itself recognized the dubious status of these provisions.

The revised "Dealer's Franchise Agreement," which was adopted by Carvel *after May, 1955* and is still being used (with minor changes not here relevant), contains altogether different price provisions from the earlier agreements. Paragraph Eighth provides as follows:

> "The Dealer shall have the right to sell Carvel's Frozen Dairy Product and/or other items authorized for sale by him under the terms of this agreement at any price that the Dealer determines. Wherever Carvel recommends a retail price, such recommendation is based upon Carvel's experience concerning all factors that enter into a proper price, but such recommendation is in no manner binding upon the Dealer."

The revised SOP for the post-1955 period changed the reference in the earlier manual from "standard selling price" to "recommended selling price."

Section "K" of the SOP which prior to May 1955 contained a provision that it was "necessary" on special sales to secure permission to sell at other than standard prices, was changed to read:

> "In the event that you plan a special sale or promotion other than those planned by your company, it is suggested that you secure permission to sell merchandise at a price below the standard permitted."

By letter dated February 27, 1956, the operators with agreements signed prior to May 1955[12] were formally notified of Carvel's changes in pricing policy. The letter, in relevant part, read as follows:

> "All references in your agreement and/or the Standard Operating Procedure to the retail prices of Carvel's Frozen Dairy Products, in its various forms, are deemed to be references to *recommended* prices only. These prices are based upon your company's considerable experience, and the sincere conviction that the price so recommended is both acceptable to the public, and profitable to your operation. However, you are entirely at liberty to vary these prices if you so desire and we disclaim any intention to control your retail prices."

There was no evidence that after February 27, 1956 Carvel imposed on any of the franchise operators any duty to maintain given prices. In fact in this later period Carvel prepared advertising signs and posters in which prices were left blank, or on which stickers could be pasted with various prices selected by the operators. Certain correspondence which was introduced in evidence also supported the fact that Carvel had abandoned its earlier price maintenance policy. One of the plaintiffs' own items of evi-

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[12] The plaintiffs in the Susser, McCoy, Mueller and Frederick cases are in this category. (Although the date of the plaintiff Rodens' franchise agreement is April 11, 1955, the form of the agreement is that which was stipulated to have been used by Carvel after May 1, 1955.)

dence, a letter from Carvel dated September 3, 1957, which went out to all operators stated: "Our supply department has blank signs to use should you care to increase or decrease your prices."

There is no convincing evidence that the dealers do not presently have the right to fix their own sale prices to the public without penalty by Carvel. In the absence of any attempt by Carvel to impose a binding price structure, the fact that Carvel announced a schedule of suggested prices is not illegal. See *Maple Flooring Mfrs. Ass'n* v. *United States*, 268 U. S. 563 (1925); *Cement Mfrs. Ass'n* v. *United States*, 268 U. S. 588 (1925).

In conclusion, the price fixing provisions in the franchise agreements between Carvel and the plaintiffs in the Susser, McCoy, Mueller and Frederick cases were illegal and the illegality in each case extended from the dates on which the respective agreements were signed[13] until Carvel formally released the operators from such price fixing provisions on February 27, 1956. Damages for such periods of illegality may be recovered to the extent proved in these four cases in a subsequent trial, subject to the application of the statute of limitations as subsequently discussed. The plaintiffs in the other cases have no cause of action for illegal price fixing since they entered into their agreements after May 1, 1955 and there was no proof that Carvel ever compelled such operators to maintain fixed prices.

VIII. General Defenses Raised by Carvel

A. *Alleged Lack of Federal Jurisdiction*

Carvel, as a general defense to all claims against it, asserts that federal jurisdiction is lacking because the re-

[13] The relevant dates in these four cases are as follows:

Plaintiff	*Date of Franchise*
Susser	7/17/54
McCoy	10/30/54
Mueller	2/24/54
Frederick	2/11/53

straints relied on by the plaintiffs do not involve, directly affect, or substantially obstruct interstate commerce.[14]

It is not disputed that Carvel itself is engaged in interstate commerce. Indeed it could hardly be argued otherwise, considering the fact that Carvel is engaged in the business of franchising stores and selling equipment in at least six states and that approximately 400 stores are in operation in these states under the Carvel name.

Carvel urges, however, that the plaintiffs are not engaged in interstate commerce and, since the restraints under attack apply to the operators' businesses, no basis for federal jurisdiction exists. The argument states that even if some of the materials which the operators use moves to them in interstate commerce such materials come to rest at the retailer's establishment, and are thereafter manufactured and transformed into the finished products which are sold to the public in purely intrastate transactions. See *Page* v. *Work*, 290 F. 2d 323 (9th Cir. 1961); *Brosius* v. *Pepsi-Cola Co.*, 155 F. 2d 99 (3d Cir. 1945).

Whatever might be the validity of the defendants' argument if the restrictions involved were imposed on an isolated dealer, it is clear that where they form part of Carvel's general policy of conducting its business, interstate commerce is so affected as to give this Court jurisdiction. The restrictions pertain not merely to the way in which the plaintiffs conduct their business but also to the way in which Carvel conducts its business. In this light it is obvious that the requisite effect on interstate commerce is present. See *United States* v. *Rock Royal Co-Operative, Inc.*, 307 U. S. 533, 568-69 (1939); *United States* v. *Standard Oil Co.*, 78 F. Supp. 850, 864-5 (S. D. Calif. 1948), *aff'd* 337 U. S. 293 (1949).

B. *Defense of the Statute of Limitations*

Section 15b of Title 15, U. S. C., provides that private treble damage suits are barred "unless commenced within four years after the cause of action accrued." Since the alleged violations on which the plaintiffs rely resulted from

[14] None of the supplier defendants rely on this defense.

certain restrictive provisions in their franchise agreements, their cause of action first accrued at the time when the agreements were signed. If the plaintiffs' causes of action "accrued" for all purposes within the meaning of 15 U. S. C. § 15b at the date of the franchise agreements, then the plaintiffs in the Susser, McCoy, Phelan, Frederick, Mueller and Giberman cases would be barred from maintaining this suit because their actions were not commenced until more than four years after they entered into their franchise agreements.[15] However, as the plaintiffs point out, the defendants' actions were part of a continuing policy of doing business and the plaintiffs are entitled to recover for such unlawful practices as occurred within the four years preceding the filing of their complaint. *Cardinal Films, Inc.* v. *Republic Pictures Corp.*, 148 F. Supp. 156 (S. D. N. Y. 1957).[16]

The only violation of the antitrust laws which the plaintiffs have proven relates to the price fixing which took place under the old franchise agreements. The only parties to these agreements who are plaintiffs here are in the Susser, McCoy, Mueller and Frederick cases. The other plaintiffs all signed franchise agreements embodying the current Carvel pricing policy which is not in violation of the antitrust laws. The parties to the earlier agreements were not shown to have been notified that Carvel no longer required them to maintain fixed prices until February 27, 1956. Therefore the parties to the old franchise agreements were presumably contractually obligated to maintain prices until February 27, 1956, at which time Carvel formally notified them of its change of policy. The complaints in the Susser, McCoy, Mueller and Frederick cases were all filed within four years of this date and they may therefore recover damages for the periods indicated below:

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[15] See Fleischer v. A. A. P., Inc., 180 F. Supp. 717 (S. D. N. Y. 1959).

[16] See Momand v. Universal Film Exchanges, 172 F. 2d 37, 49 (1st Cir. 1948).

Plaintiff	Date of Franchise	Date Action Commenced	Period of Price Fixing for Which Damages May Be Recovered
Susser	7/17/54	9/11/59	9/11/55 to 2/27/56
McCoy	10/30/54	10/28/59	10/28/55 to 2/27/56
Mueller	2/24/54	9/ 5/58	9/ 5/54 to 2/27/56
Frederick	2/11/53	9/ 5/58	9/ 5/54 to 2/27/56

IX. Conclusion

1. The action of the plaintiffs against the supplier defendants must be dismissed since the plaintiffs failed to prove that the supplier defendants participated in any illegal conspiratorial boycott against direct sales as alleged or that they engaged in any other violations of the antitrust laws.

2. The plaintiffs failed to show that the requirement imposed by Carvel that the plaintiffs use the supplier defendants' products or products approved by Carvel was an illegal tie-in or a violation of the antitrust laws in any respect.

3. The plaintiffs failed to prove that the restriction against selling other than Carvel approved products on plaintiffs' premises was an illegal form of exclusive dealing or violated the antitrust laws in any respect.

4. The price restrictions imposed by Carvel on the plaintiffs who signed their agreements prior to May 1, 1955 were illegal and the plaintiffs in the Susser, McCoy, Mueller and Frederick cases are entitled to a trial on the issue of damages; all other causes of action of these plaintiffs should be dismissed for failure of proof.

5. The actions of the plaintiffs in the Modick, Ossola, Phelan, Pierce, Rodens, Seu, Pazdro and Giberman cases should be dismissed in their entirety for failure of proof.[*]

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[*] It may be noted that although franchise agreements of the type involved in this case have seldom figured in antitrust opinions, the general legal conclusions arrived at in this opinion regarding the legality of Carvel's method of conducting its business operations are supported by the recent unreported decision of the

X. Judgments to Be Entered

1. Judgment shall be entered dismissing the actions against the following supplier defendants: Eagle Cone Corporation, H. P. Hood & Sons, Inc., Mohawk Container Company, Inc. and Rakestraw's Dairy Products, Inc.

2. Judgments shall be entered dismissing the actions of the plaintiffs against the individual defendants named in the complaints.

3. Judgment shall be entered dismissing the actions of Lester N. Modick and Harriet M. Modick, of James Ossola and Elizabeth G. Ossola, of Joseph P. Phelan, of James P. Pierce and Rita Pierce and Sol Rodens, of Matthew Seu and Jane L. Seu, of Paul S. Giberman and Gertrude Giberman, and of Joseph Pazdro and Yolanda Pazdro.

In accordance with Rule 54(b) the Court directs that final judgments may be entered as to all of the causes of action hereinabove referred to. The Court finds there is no good reason for delay in the entry of such judgments.

Plaintiffs in the Susser, McCoy, Mueller and Frederick cases shall be entitled to a trial on the issue of damages arising out of any restrictions imposed by Carvel on prices to be charged by said plaintiffs for the periods beginning within four years prior to the filing of the complaints and running up to February 27, 1956; such trial to be set at the early convenience of the Court.

Let judgments be entered accordingly.

This opinion shall constitute the findings of fact and conclusions of law of the Court.

Dated: New York, N. Y.
June 7, 1962.

Archie O. Dawson, U. S. D. J.

United States District Court for the District of Kansas in the case of Engbrecht v. Dairy Queen Company of Mexico, Missouri (No. W-1772 Civil—decided April 12, 1962). That case, which involved franchise agreements closely analogous to those at issue here, held that the provisions in those agreements were not in violation of the antitrust laws. In addition, the court there found that the defendant did not fix the prices at which Dairy Queen products were sold to the public.

IN UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Docket No. Civil 150-212

BERNARD SUSSER, GERTRUDE SUSSER, and SHIRLEY SCHWARTZ, Plaintiffs,

against

CARVEL CORPORATION, CARVEL DARI-FREEZE STORES, INC., CARVEL STORES REALTY CORPORATION, MOHAWK CONTAINER COMPANY, INC., EAGLE CONE CORPORATION, and H. P. HOOD & SONS, Defendants.

JUDGMENT—June 19, 1962

This action, together with other actions consolidated for trial, having duly come on for trial before the Court without a jury on March 19, 20 and 21, 1962 and the Court, after considering all the evidence adduced by the respective parties and the briefs submitted by their respective counsel and after due deliberation, having on June 8, 1962 filed its opinion in writing containing its findings of fact and conclusions of law and having directed therein:

"1. Judgment shall be entered dismissing the actions against the following supplier defendants: Eagle Cone Corporation, H. P. Hood & Sons, Inc., Mohawk Container Company, Inc. and Rakestraw's Dairy Products, Inc.;

2. Judgment shall be entered dismissing the actions of the plaintiffs against the individual defendants named in the complaints;

3. Judgment shall be entered dismissing the actions of Lester N. Modick and Harriet M. Modick, of James Ossola and Elizabeth G. Ossola, of Joseph P. Phelan, of James P. Pierce and Rita Pierce and Sol Rodens, of Matthew Seu and Jane L. Seu, of Paul S. Giberman

and Gertrude Giberman, and of Joseph Pazdro and Yolanda Pazdro";

And the Court in its opinion having directed further:

"In accordance with Rule 54(b) the Court directs that final judgments may be entered as to all of the causes of action hereinabove referred to. The Court finds there is no good reason for delay in the entry of such judgments.

"Plaintiffs in the Susser, McCoy, Mueller and Frederick cases shall be entitled to a trial on the issue of damages arising out of any restrictions imposed by Carvel on prices to be charged by said plaintiffs for the periods beginning within four years prior to the filing of the complaints and running up to February 27, 1956, such trial to be set at the early convenience of the Court.

"Let judgments be entered accordingly."

Now, in accordance with paragraph 1 of the direction in the opinion of the Court concerning "Judgments To Be Entered", it is hereby

Adjudged: That all claims of the plaintiffs in the complaint in this action against H. P. Hood & Sons, Inc., Mohawk Container Company, Inc. and Eagle Cone Corporation be dismissed and that this action be dismissed finally against each of said defendants, and that each of said defendants recover its costs against the plaintiffs as may be proper, taxed hereafter in this action.

Dated: New York, N. Y., June 19th, 1962.

Archie O. Dawson, U. S. D. J.

Rec'd in Clerk's Office 6/21/62

Judgment Entered June 21, 1962.

Herbert A. Charlson, Clerk.

[fol. 84]

IN UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

152 Civ. 119

LESTER N. MODICK and HARRIET M. MODICK, Plaintiffs,

against

CARVEL STORES OF NEW YORK, INC., CARVEL CORPORATION, CARVEL DARI-FREEZE STORES, INC., MOHAWK CONTAINER COMPANY, INC., EAGLE COVE CORPORATION, H. P. HOOD & SONS, and BURRY BISCUIT CORP., Defendants.

JUDGMENT—June 21, 1962

This action having come on for trial on the merits before the Court without a jury and a trial having been had on November 20, 21, and 22, 1961 on plaintiffs' claims for damages for fraud and deceit set forth as a First Cause of Action in plaintiffs' Amended Complaint, and the Court, upon consideration of the evidence introduced therein, the arguments, motions and briefs of counsel for the respective parties, having made a decision adverse to the plaintiffs and filed an "Opinion, Findings of Fact and Conclusions of Law" dated February 7, 1962, and

A trial having been had on the merits before the Court without a jury on March 19, 20 and 21, 1962, on plaintiffs' claims for damages under the antitrust laws set forth as a Second Cause of Action in plaintiffs' Amended Complaint, and the Court, upon consideration of the evidence introduced therein, the arguments, motions and briefs of counsel for the respective parties, having made a decision adverse to the plaintiffs and filed an Opinion dated June 7, 1962, constituting and incorporating findings of fact and conclusions of law, and having made an express determination that there is no just reason for delay and an express direction for the entry of judgment, and upon due deliberation, it is

Ordered and adjudged that the plaintiffs take nothing by this action: that each and every claim for relief stated in the Amended Complaint in this action against Carvel Stores of New York, Inc., Carvel Corporation, Carvel Dari-Freeze Stores, Inc. be and it is hereby dismissed and that this action be and it is hereby dismissed finally against each of said defendants, and that said defendants have and recover their costs in this action as said costs may hereafter be taxed, and have execution therefor.

Dated: New York, New York, June 21, 1962.

....., U. S. D. J.

Judgment Entered June 21, 1962.

....., Clerk.

IN UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Docket No. Civil 152-119

LESTER N. MODICK and HARRIET M. MODICK, Plaintiffs,

against

CARVEL STORES OF NEW YORK, INC., CARVEL CORPORATION, CARVEL DARI-FREEZE STORES, INC., MOHAWK CONTAINER COMPANY, INC., EAGLE CONE CORPORATION, and H. P. HOOD & SONS, Defendants.

JUDGMENT—June 19, 1962

This action, together with other actions consolidated for trial, having duly come on for trial before the Court without a jury on March 19, 20 and 21, 1962 and the Court, after considering all the evidence adduced by the respective parties and the briefs submitted by their respective counsel and after due deliberation, having on June 5, 1962 filed its

opinion in writing containing its findings of fact and conclusions of law and having directed therein:

"1. Judgment shall be entered dismissing the actions against the following supplier defendants: Eagle Cone Corporation, H. P. Hood & Sons, Inc., Mohawk Container Company, Inc. and Rakestraw's Dairy Products, Inc.;

2. Judgment shall be entered dismissing the actions of the plaintiffs against the individual defendants named in the complaints;

3. Judgment shall be entered dismissing the actions of Lester N. Modick and Harriet M. Modick, of James Ossola and Elizabeth G. Ossola, of Joseph P. Phelan of James P. Pierce and Rita Pierce and Sol Rodens, of Matthew Seu and Jane L. Seu, of Paul S. Giberman and Gertrude Giberman, and of Joseph Pazdro and Yolanda Pazdro";

And the Court in its opinion having directed further:

"In accordance with Rule 54(b) the Court directs that final judgments may be entered as to all of the causes of action hereinabove referred to. The Court finds there is no good reason for delay in the entry of such judgments.

"Plaintiffs in the Susser, McCoy, Mueller and Frederick cases shall be entitled to a trial on the issue of damages arising out of any restrictions imposed by Carvel on prices to be charged by said plaintiffs for the periods beginning within four years prior to the filing of the complaints and running up to February 27, 1956, such trial to be set at the early convenience of the Court.

"Let judgments be entered accordingly."

Now, in accordance with paragraph 1 of the direction in the opinion of the Court concerning "Judgments To Be Entered", it is hereby

Adjudged: That all claims of the plaintiffs in the complaint in this action against H. P. Hood & Sons, Inc., Mohawk Container Company, Inc. and Eagle Cone Corporation be dismissed and that this action be dismissed finally against each of said defendants, and that each of said defendants recover its costs against the plaintiffs as may be properly taxed hereafter in this action.

Dated: New York, N. Y., June 19th, 1962.

Archie O. Dawson, U. S. D. J.

Judgment Entered June 21, 1952.

Herbert A. Charlson, Clerk.

IN UNITED STATES DISTRICT COURT.

SOUTHERN DISTRICT OF NEW YORK

Docket No. Civil 152-120

MARTHA M. McCOY and FRANK T. McCOY, Plaintiffs,

against

CARVEL CORPORATION, CARVEL DARI-FREEZE STORES, INC., CARVEL STORES REALTY CORPORATION, MOHAWK CONTAINER COMPANY, INC., EAGLE CONE CORPORATION and H. P. HOOD & SONS, Defendants.

JUDGMENT—June 19, 1962

This action, together with other actions consolidated for trial, having duly come on for trial before the Court without a jury on March 19, 20, and 21, 1962 and the Court, after considering all the evidence adduced by the respective parties and the briefs submitted by their respective counsel and after due deliberation, having on June 8, 1962 filed its opinion in writing containing its findings of fact and conclusions of law and having directed therein:

"1. Judgment shall be entered dismissing the actions against the following supplier defendants: Eagle Cone Corporation, H. P. Hood & Sons, Inc., Mohawk Container Company, Inc. and Rakestraw's Dairy Products, Inc.;

2. Judgment shall be entered dismissing the actions of the plaintiffs against the individual defendants named in the complaints;

3. Judgment shall be entered dismissing the actions of Lester N. Modick and Harriet M. Modick, of James Ossola and Elizabeth G. Ossola, of Joseph P. Phelan, of James P. Pierce and Rita Pierce and Sol Rodens, of Matthew Seu and Jane L. Seu, of Paul S. Giberman and Gertrude Giberman, and of Joseph Pazdro and Yolanda Pazdro";

And the Court in its opinion having directed further:

"In accordance with Rule 54(b) the Court directs that final judgments may be entered as to all of the causes of action hereinabove referred to. The Court finds there is no good reason for delay in the entry of such judgments.

"Plaintiffs in the Susser, McCoy, Mueller and Frederick cases shall be entitled to a trial on the issue of damages arising out of any restrictions imposed by Carvel on prices to be charged by said plaintiffs for the periods beginning within four years prior to the filing of the complaints and running up to February 27, 1956, such trial to be set at the early convenience of the Court.

"Let judgments be entered accordingly."

Now, in accordance with paragraph 1 of the direction in the opinion of the Court concerning "Judgments To Be Entered", it is hereby

Adjudged: That all claims of the plaintiffs in the complaint in this action against H. P. Hood & Sons, Inc., Mohawk Container Company, Inc. and Eagle Cone Corporation be dismissed and that this action be dismissed

finally against each of said defendants, and that each of said defendants recover its costs against the plaintiffs as may be properly taxed hereafter in this action.

Dated: New York, N. Y., June 19th, 1962.

Archie O. Dawson, U. S. D. J.

Judgment Entered June 21, 1962.

Herbert A. Charlson, Clerk.

IN UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

153 Civ. 193

JAMES OSSOLA and ELIZABETH G. OSSOLA, Plaintiffs,

against

CARVEL STORES OF NEW YORK, INC., CARVEL DARI-FREEZE STORES, INC., CARVEL STORES REALTY CORPORATION, MOHAWK CONTAINER COMPANY, INC., EAGLE CONE CORPORATION, H. P. HOOD & SONS, and BURRY BISCUIT CORP., Defendants.

JUDGMENT—June 21, 1962

This action having come on for trial on the merits before the Court without a jury and a trial having been had on November 29 and 30, 1961 on plaintiffs' claims for damages for fraud and deceit set forth as a First Cause of Action in plaintiffs' Amended Complaint, and the Court, upon consideration of the evidence introduced therein, the arguments, motions and briefs of counsel for the respective parties, having made a decision adverse to the plaintiffs and filed an "Opinion, Findings of Fact and Conclusions of Law" dated February 7, 1962, and

A trial having been had on the merits before the Court without a jury on March 19, 20 and 21, 1962, on plaintiffs'

claims for damages under the antitrust laws set forth as a Second Cause of Action in plaintiffs' Amended Complaint, and the Court, upon consideration of the evidence introduced therein, the arguments, motions and briefs of counsel for the respective parties, having made a decision adverse to the plaintiffs and filed an Opinion dated June 7, 1962, constituting and incorporating findings of fact and conclusions of law, and having made an express determination that there is no just reason for delay and an express direction for the entry of judgment, and upon due deliberation, it is

Ordered and adjudged that the plaintiffs take nothing by this action; that each and every claim for relief stated in the Amended Complaint in this action against Carvel Stores of New York, Inc., Carvel Dari-Freeze Stores, Inc., and Carvel Stores Realty Corporation be and it is hereby dismissed and that this action be and it is hereby dismissed finally against each of said defendants, and that said defendants have and recover their costs in this action as said costs may hereafter be taxed, and have execution therefor.

Dated: New York, New York, June 21, 1962.

....., U. S. D. J.

Judgment entered June 21, 1962.

....., Clerk.

IN UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Docket No. Civil 153-193

JAMES OSSOLA and ELIZABETH G. OSSOLA, Plaintiffs,

against

CARVEL STORES OF NEW YORK, INC., CARVEL DARI-FREEZE STORES, INC., CARVEL STORES REALTY CORPORATION, MOHAWK CONTAINER COMPANY, INC., EAGLE CONE CORPORATION, and H. P. HOOD & SONS, Defendants.

JUDGMENT—June 19, 1962

This action, together with other actions consolidated for trial, having duly come on for trial before the Court without a jury on March 19, 20 and 21, 1962 and the Court, after considering all the evidence adduced by the respective parties and the briefs submitted by their respective counsel and after due deliberation, having on June 8, 1962 filed its opinion in writing containing its findings of fact and conclusions of law and having directed therein:

"1. Judgment shall be entered dismissing the actions against the following supplier defendants: Eagle Cone Corporation, H. P. Hood & Sons, Inc., Mohawk Container Company, Inc. and Rakestraw's Dairy Products, Inc.;

2. Judgment shall be entered dismissing the actions of the plaintiffs against the individual defendants named in the complaint;

3. Judgment shall be entered dismissing the actions of Lester N. Modick and Harriet M. Modick, of James Ossola and Elizabeth G. Ossola, of Joseph P. Phelan, of James P. Pierce and Rita Pierce and Sol Rodens, of Matthew Seu and Jane L. Seu, of Paul S. Giberman and Gertrude Giberman, and of Joseph Pazdro and Yolanda Pazdro";

And the Court in its opinion having directed further:

"In accordance with Rule 54(b) the Court directs that final judgments may be entered as to all of the causes of action hereinabove referred to. The Court finds there is no good reason for delay in the entry of such judgments.

"Plaintiffs in the Susser, McCoy, Mueller and Frederick cases shall be entitled to a trial on the issue of damages arising out of any restrictions imposed by Carvel on prices to be charged by said plaintiffs for the periods beginning within four years prior to the filing of the complaints and running up to February 27, 1956, such trial to be set at the early convenience of the Court.

"Let judgments be entered accordingly."

Now, in accordance with paragraph 1 of the direction in the opinion of the Court concerning "Judgments To Be Entered", it is hereby

Adjudged: That all claims of the plaintiffs in the complaint in this action against H. P. Hood & Sons, Inc., Mohawk Container Company, Inc. and Eagle Cone Corporation be dismissed and that this action be dismissed finally against each of said defendants, and that each of said defendants recover its costs against the plaintiffs as may be properly taxed hereafter in this action.

Dated: New York, N. Y., June 19th, 1962.

Archie O. Dawson, U. S. D. J.

Rec'd in Clerk's Office 6/21/62.

Judgment entered June 21, 1962.

Herbert A. Charlson, Clerk.

In United States District Court
Southern District of New York
Civil Action File No. 153-194

Joseph P. Phelan, Plaintiff,

against

Carvel Stores of New York, Inc., Carvel Dari-Freeze Stores, Inc., Carvel Stores Realty Corporation, Mohawk Container Company, Inc., Eagle Cone Corporation, H. P. Hood & Sons, and Burry Biscuit Corp., Defendants.

Judgment—June 21, 1962.

This action having come on for trial on the merits before the Court without a jury and a trial having been had on December 4, 5 and 6, 1961 on plaintiff's claim for damages for fraud and deceit set forth as First Cause of Action, and the Court, upon consideration of the evidence introduced therein, the arguments, motions and briefs of counsel for the respective parties, having made a decision adverse to the plaintiffs and filed an "Opinion, Findings of Fact and Conclusions of Law" dated February 7, 1962, and

A trial having been had on the merits before the Court without a jury on March 19, 20 and 21, 1962 on plaintiff's claim for damages under the antitrust laws set forth as Second Cause of Action, and the Court, upon consideration of the evidence introduced therein, the arguments, motions and briefs of counsel for the respective parties, having made a decision adverse to the plaintiff and filed an Opinion dated June 7, 1962, constituting and incorporating findings of fact and conclusions of law, and having made an express determination that there is no just reason for delay and an express direction for the entry of judgment, and upon due deliberation, it is

Ordered and adjudged that the plaintiff take nothing by this action; that each and every claim for relief stated in

the amended complaint in this action against Carvel Stores of New York, Inc., Carvel Dari-Freeze Stores, Inc., and Carvel Stores Realty Corporation be and it is hereby dismissed and that this action be and it is hereby dismissed finally against each of said defendants, and that said defendants have and recover their costs in this action as said costs may hereafter be taxed, and have execution therefor.

Dated: New York, New York, June 21, 1962.

.....U. S. D. J.

Judgment entered June 21, 1962.

.....Clerk.

In United States District Court

Southern District of New York

Docket No. Civil 153-194

Joseph P. Phelan, Plaintiff,

against

Carvel Stores of New York, Inc., Carvel Dari-Freeze Stores Inc., Carvel Stores Realty Corporation, Mohawk Container Company, Inc., Eagle Cone Corporation and H. P. Hood & Sons, Defendants.

Judgment—June 19, 1962

This action, together with other actions consolidated for trial, having duly come on for trial before the Court without a jury on March 19, 20 and 21, 1962 and the Court, after considering all the evidence adduced by the respective parties and the briefs submitted by their respective counsel and after due deliberation, having on June 5, 1962 filed its opinion in writing containing its findings of fact and conclusions of law and having directed therein:

"1. Judgment shall be entered dismissing the actions against the following supplier defendants: Eagle Cone Corporation, H. P. Hood & Sons, Inc., Mohawk Container Company, Inc. and Rakestraw's Dairy Products, Inc.;

"2. Judgment shall be entered dismissing the actions of the plaintiffs against the individual defendants named in the complaints;

"3. Judgment shall be entered dismissing the actions of Lester N. Modick and Harriet M. Modick, of James Ossola and Elizabeth G. Ossola, of Joseph P. Phelan, of James P. Pierce and Rita Pierce, and Sol Rodens, of Matthew Seu and Jane L. Seu, of Paul S. Giberman and Gertrude Giberman, and of Joseph Pazdro and Yolanda Pazdro".

And the Court in its opinion having directed further:

"In accordance with Rule 54(b) the Court directs that final judgments may be entered as to all of the causes of action hereinabove referred to. The Court finds there is no good reason for delay in the entry of such judgments.

"Plaintiffs in the Susser, McCoy, Mueller and Frederick cases shall be entitled to a trial on the issue of damages arising out of any restrictions imposed by Carvel on prices to be charged by said plaintiffs for the periods beginning within four years prior to the filing of the complaints and running up to February 27, 1956, such trial to be set at the early convenience of the Court.

"Let judgments be entered accordingly."

Now, in accordance with paragraph 1 of the direction in the opinion of the Court concerning "Judgments To Be Entered", it is hereby

Adjudged: That all claims of the plaintiff in the complaint in this action against H. P. Hood & Sons, Inc., Mohawk Container Company, Inc. and Eagle Cone Corporation be dismissed and that this action be dismissed

finally against each of said defendants, and that each of said defendants recover its costs against the plaintiff as may be properly taxed hereafter in this action.

Dated: New York, N. Y., June 19th, 1962.

Archie O. Dawson, U. S. D. J.

Rec'd in Clerk's Office 6/21/62.

Judgment Entered June 21, 1962.

Herbert A. Charlson, Clerk.

IN UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

60 Civ. 63

JAMES P. PIERCE, RITA PIERCE, LYLE FREDERICK, LEROY M. FREDERICK, ALFRED MUELLER and SOL RODENS, Plaintiffs,

against

CARVEL STORES OF NEW YORK, INC., CARVEL DARI-FREEZE STORES, INC., CARVEL CORPORATION, CARVEL STORES OF PENNSYLVANIA, INC., CHAIN LOCATIONS OF AMERICA, INC., ILLINOIS BAKING CORPORATION, RAKESTRAW'S DAIRY PRODUCTS, INC., MOHAWK CONTAINER COMPANY, INC., BURRY BISCUIT CORPORATION, RICHARDSON CORPORATION, THOMAS CARVEL, FRED VETTEL, JR., GEORGE P. CLARK, ROBERT J. SHALLIS, AGNES CARVEL, DARROW NUTT, ANN M. MCHUGH, STANLEY W. TOWNSEND, BRUCE CARVEL, MILDRED ARCADIPANE, RICHARD A. CEROSKY, PHILIP AGREE and ARTHUR MARCIANTE, Defendants.

JUDGMENT—June 21, 1962

This action having come on for trial on the merits before the Court without a jury and a trial having been had on December 8, 11, 12, 13 and 14, 1961 on plaintiffs' claims

for damages for fraud and deceit set forth as First, Third, Fifth and Seventh Causes of Action in plaintiffs' Amended Complaint, and the Court, upon consideration of the evidence introduced therein, the arguments, motions and briefs of counsel for the respective parties, having made a decision adverse to the plaintiffs and filed an "Opinion, Findings of Fact and Conclusions of Law" dated February 7, 1962, and

A trial having been had on the merits before the Court without a jury on March 19, 20 and 21, 1962 on plaintiffs' claims under the antitrust laws for damages set forth as Second, Fourth, Sixth, Eighth, Ninth, Tenth and Eleventh Causes of Action and for declaratory judgment set forth as the Twelfth Cause of Action in said Amended Complaint, and the Court, upon consideration of the evidence introduced therein, the arguments, motions and briefs of counsel for the respective parties, having made a decision adverse to the plaintiffs as to said Second, Fourth, Ninth, Tenth, Eleventh and Twelfth Causes of Action and having made a decision adverse to the plaintiffs Lyle Frederick, LeRoy Frederick and Alfred Mueller only as to the individual defendants named in said Sixth and Eighth Causes of Action, and having filed an Opinion dated June 7, 1962 constituting and incorporating findings of fact and conclusions of law, and having included therein directions that:

> "Judgment shall be entered dismissing the actions of the plaintiffs against the individual defendants named in the complaints;
>
> "Judgment shall be entered dismissing the actions of Lester N. Modick and Harriet M. Modick, of James Ossola and Elizabeth G. Ossola, of Pierce and Sol Rodens, of Matthew Seu and Jane L. Seu, of Paul S. Giberman and Gertrude Giberman, and of Joseph Pazdro and Yolanda Pazdro;
>
> "In accordance with Rule 54(b) the Court directs that final judgments may be entered as to all of the causes of action hereinabove referred to. The Court finds there is no good reason for delay in the entry of such judgments."

Now, in accordance with said opinion and directions therein and upon due deliberation, it is hereby

Ordered and adjudged that:

1. Plaintiffs James Pierce, Rita Pierce and Sol Rodens take nothing as to each and every claim for relief stated on their behalf in said amended complaint, and that each and every such claim shall be and it is hereby dismissed finally against the defendants, who shall have and recover their costs as the same may hereafter be taxed, and have execution therefor, and that

2. Plaintiffs Lyle Frederick, LeRoy Frederick and Alfred Mueller take nothing as to each and every claim for relief on their behalf stated in said amended complaint against the individual defendants named therein, and that each and every claim against said individual defendants be and it is hereby dismissed finally against the defendants who shall have and recover their costs as the same may hereafter be taxed, and have execution therefor.

Dated: New York, N. Y., June 21, 1962.

....., U. S. D. J.

Judgment Entered June 21, 1962.

....., Clerk.

IN UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Docket No. 60 Civ. 63

JAMES P. PIERCE, RITA PIERCE, LYLE FREDERICK, LEROY M. FREDERICK, ALFRED MUELLER and SOL RODENS, Plaintiffs,

against

CARVEL STORES OF NEW YORK, INC., CARVEL DARI-FREEZE STORES, INC., CARVEL CORPORATION, CARVEL STORES OF PENNSYLVANIA, INC., CHAIN LOCATIONS OF AMERICA, INC., RAKESTRAW'S DAIRY PRODUCTS, INC., MOHAWK CONTAINER COMPANY, INC., THOMAS CARVEL, FRED VETTEL, JR., GEORGE P. CLARK, ROBERT J. SHALLIS, AGNES CARVEL, DARROW NUTT, ANN M. McHUGH, STANLEY W. TOWNSEND, BRUCE CARVEL, MILDRED ARCADIPANE, RICHARD A. CEROSKY, PHILIP AGREE and ARTHUR MARCIANTE, Defendants.

JUDGMENT—June 19, 1962

This action, together with other actions consolidated for trial, having duly come on for trial before the Court, without a jury, on March 19, 20, and 21, 1962 and the Court, after considering all the evidence adduced by the respective parties and the briefs submitted by their respective counsel and after due deliberation, having on June 8, 1962 filed its opinion in writing containing its findings of fact and conclusions of law and having directed therein:

"1. Judgment shall be entered dismissing the actions against the following supplier defendants: Eagle Cone Corporation, H. P. Hood & Sons, Inc., Mohawk Container Company, Inc. and Rakestraw's Dairy Products, Inc.;

2. Judgment shall be entered dismissing the actions of the plaintiffs against the individual defendants named in the complaints;

3. Judgment shall be entered dismissing the actions of Lester N. Modick and Harriet M. Modick, of James Ossola and Elizabeth G. Ossola, of Joseph P. Phalen, of James P. Pierce, and Rita Pierce, and Sol Rodens, of Matthew Seu and Jane L. Seu, of Paul S. Giberman and Gertrude Giberman, and of Joseph Pazdro and Yolanda Pazdro";

Plaintiffs in the Susser, McCoy, Mueller and Frederick cases shall be entitled to a trial on the issue of damages arising out of any restrictions imposed by Carvel on prices to be charged by said plaintiffs for the periods beginning within four years prior to the filing of the complaints and running up to February 27, 1956; such trial to be set at the early convenience of the Court.

And the Court in its opinion having directed further:

"In accordance with Rule 54(b) the Court directs that final judgments may be entered as to all of the causes of action hereinabove referred to. The Court finds there is no good reason for delay in the entry of such judgments;

Let judgments be entered accordingly."

And in accordance with Paragraph numbered 1 of the Court's direction above referred to, it is hereby

Adjudged: That all claims of the plaintiffs in the complaint in this action against Mohawk Container Company, Inc. and Rakestraw's Dairy Products, Inc. be dismissed and that this action be dismissed finally against each of said defendants and that each of said defendants recover its costs against the plaintiffs as may be properly taxed hereafter in this action.

Dated, New York, N. Y., June 19th, 1962.

Archie O. Dawson, U. S. D. J.

Judgment Entered June 21, 1962.

Herbert A. Charlson, Clerk.

IN UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

60 Civ. 1096

MATTHEW SEU and JANE L. SEU, Plaintiffs,

against

CARVEL CORPORATION, CARVEL STORES OF NEW YORK, INC., CARVEL DARI-FREEZE STORES, INC., CARVEL STORES REALTY CORPORATION, MOHAWK CONTAINER COMPANY, INC., EAGLE CONE CORPORATION, H. P. HOOD & SONS, and BURRY BISCUIT CORP., Defendants.

JUDGMENT—June 21, 1962

This action having come on for trial on the merits before the Court without a jury and a trial having been had on December 14, 15 and 18, 1961 on plaintiff Jane L. Seu's claims for damages for fraud and deceit set forth as First Cause of Action, and the Court, upon consideration of the evidence introduced therein, the arguments, motions and briefs of counsel for the respective parties, having made a decision adverse to the plaintiff and filed an "Opinion, Findings of Fact and Conclusions of Law" dated February 7, 1962, and

A trial having been had on the merits before the Court without a jury on March 19, 20 and 21, 1962, on plaintiff Jane L. Seu's claims for declaratory judgment under the antitrust laws set forth as Third and Fourth Causes of Action, and on said plaintiff's claims for injunction under the antitrust laws set forth as Fifth Cause of Action, and on said plaintiff's claims for damages under the antitrust laws set forth as Sixth Cause of Action, and the Court, upon consideration of the evidence introduced therein, the arguments, motions and briefs of counsel for the respective parties, having made a decision adverse to the plaintiff,

and filed an Opinion dated June 7, 1962, constituting and incorporating findings of fact and conclusions of law, and

The aforementioned decisions having included determination of plaintiff Jane L. Seu's claims for rescission of lease set forth as Second Cause of Action, and

The Court prior to trial having at a Pre-Trial Conference on September 7, 1961, upon consideration of motion dated August 28, 1961 by defendants Carvel Corporation, Carvel Stores of New York, Inc., Carvel Dari-Freeze Stores, Inc. and Carvel Stores Realty Corporation, and arguments for the respective parties, having directed dismissal of each and every claim for relief stated in the complaint by plaintiff Matthew Seu against defendants Carvel Corporation, Carvel Stores of New York, Inc., Carvel Dari-Freeze Stores, Inc. and Carvel Stores Realty Corporation, and entry of judgment thereon, and

The Court in said Opinion dated June 7, 1962 having made an express determination that there is no just reason for delay and an express direction for the entry of judgment, and upon due deliberation, it is

Ordered and adjudged that the plaintiffs Matthew Seu and Jane L. Seu take nothing by this action; that each and every claim for relief stated in the complaint in this action against Carvel Corporation, Carvel Stores of New York, Inc., Carvel Dari-Freeze Stores, Inc. and Carvel Stores Realty Corporation, be and it is hereby dismissed and that this action be and it is hereby dismissed finally against each of said defendants, and that said defendants have and recover their costs in this action as said costs may hereafter be taxed, and have execution therefor.

....., U. S. D. J.

Dated: New York, New York, June 21, 1962.

Judgment Entered June 21, 1962.

....., Clerk.

IN UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
Docket No. 60 Civil 1096

MATTHEW SEU and JANE L. SEU, Plaintiffs,

against

CARVEL CORPORATION, CARVEL STORES OF NEW YORK, INC., CARVEL DARI-FREEZE STORES, INC., CARVEL STORES REALTY CORPORATION, MOHAWK CONTAINER COMPANY, INC., EAGLE CONE CORPORATION and H. P. HOOD & SONS, Defendants.

JUDGMENT—June 19, 1962

This action, together with other actions consolidated for trial, having duly come on for trial before the Court without a jury on March 19, 20 and 21, 1962 and the Court, after considering all the evidence adduced by the respective parties and the briefs submitted by their respective counsel and after due deliberation, having on June 8, 1962 filed its opinion in writing, containing its findings of fact and conclusions of law and having directed therein:

"1. Judgment shall be entered dismissing the actions against the following supplier defendants: Eagle Cone Corporation, H. P. Hood & Sons, Inc., Mohawk Container Company, Inc. and Rakestraw's Dairy Products, Inc.;

2. Judgment shall be entered dismissing the actions of the plaintiffs against the individual defendants named in the complaints;

3. Judgment shall be entered dismissing the actions of Lester N. Modick and Harriet M. Modick, of James Ossola and Elizabeth G. Ossola, of Joseph P. Phelan, of James P. Pierce and Rita Pierce and Sol Rodens, of Matthew Seu and Jane L. Seu, of Paul S. Giberman and Gertrude Giberman, and of Joseph Pazdro and Yolanda Pazdro";

And the Court in its opinion having directed further:

> "In accordance with Rule 54(b) the Court directs that final judgments may be entered as to all of the causes of action hereinabove referred to. The Court finds there is no good reason for delay in the entry of such judgments.
>
> "Plaintiffs in the Susser, McCoy, Mueller and Frederick cases shall be entitled to a trial on the issue of damages arising out of any restrictions imposed by Carvel on prices to be charged by said plaintiffs for the periods beginning within four years prior to the filing of the complaints and running up to February 27, 1956, such trial to be set at the early convenience of the Court.
>
> "Let judgments be entered accordingly."

Now, in accordance with paragraph 1 of the direction in the opinion of the Court concerning "Judgments To Be Entered", it is hereby

Adjudged: That all claims of the plaintiffs in the complaint in this action against H. P. Hood & Sons, Inc., Mohawk Container Company, Inc. and Eagle Cone Corporation be dismissed and that this action be dismissed finally against each of said defendants, and that each of said defendants recover its costs against the plaintiffs as may be properly taxed hereafter in this action.

Dated: New York, N. Y., June 19th, 1962.

Archie O. Dawson, U. S. D. J.

Rec'd in Clerk's Office 6/21/62.

Judgment Entered June 21, 1962.

Herbert A. Charlson, Clerk.

IN UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
Civil Action File No. 60 Civ. 1990

PAUL S. GIBERMAN and GERTRUDE GIBERMAN, Plaintiffs,

against

CARVEL STORES OF NEW YORK, INC., CARVEL DARI-FREEZE STORES, INC., CARVEL CORPORATION, CARVEL STORES OF PENNSYLVANIA, INC., CHAIN LOCATIONS OF AMERICA, INC., CARVEHICLE CORP., ILLINOIS BAKING CORPORATION, RAKESTRAW'S DAIRY PRODUCTS, INC., MOHAWK CONTAINER COMPANY, INC., BURRY BISCUIT CORPORATION, RICHARDSON CORPORATION, THOMAS CARVEL, FRED VETTEL, JR., GEORGE P. CLARK, ROBERT J. SHALLIS, AGNES CARVEL, DARROW [illegible]TT, ANN McHUGH, STANLEY W. TOWNSEND, BRUCE CARVEL, MILDRED ARCADIPANE, RICHARD A. CEROSKY, PHILIP AGREE and ARTHUR MARCIANTE, Defendants.

JUDGMENT—June 21, 1962

This action having come on for trial on the merits before the Court without a jury and a trial having been had on December 4, 5 and 6, 1961 on plaintiff's claims for damages for fraud and deceit set forth as First and Fourth Causes of Action, and on plaintiffs' claims for damages for conspiracy to coerce set forth as Third Cause of Action, and the Court, upon consideration of the evidence introduced therein, the arguments, motions and briefs of counsel for the respective parties, having made a decision adverse to the plaintiffs and filed an "Opinion, Findings of Fact and Conclusions of Law" dated February 7, 1962, and

A trial having been had on the merits before the Court without a jury on March 19, 20 and 21, 1962, on plaintiffs' claims for damages under the antitrust laws set forth as Second, Fifth and Sixth Causes of Action, and on plaintiffs' claims for declaratory judgment under the antitrust laws

set forth as Seventh Cause of Action, and the Court, upon consideration of the evidence introduced therein, the arguments, motions and briefs of counsel for the respective parties, having made a decision adverse to the plaintiffs and filed an Opinion dated June 7, 1962, constituting and incorporating findings of fact and conclusions of law, and

The aforementioned decisions having included determination of the plaintiffs' claim for rescission of a lease set forth as Eighth Cause of Action, and the Court in the Opinion dated June 7, 1962 having made an express determination that there is no just reason for delay and an express direction for the entry of judgment and upon due deliberation, it is

Ordered and adjudged that the plaintiffs take nothing by this action; that each and every claim for relief stated in the complaint in this action against Carvel Stores of New York, Inc., Carvel Dari-Freeze Stores, Inc., Carvel Corporation, Carvel Stores of Pennsylvania, Inc., Chain Locations of America, Inc., Carvehicle Corp., Thomas Carvel, Fred Vettel, Jr., George P. Clark, Robert J. Shallis, Agnes Carvel, Darrow Nutt, Ann M. McHugh, Stanley W. Townsend, Bruce Carvel, Mildred Areadipane, Richard A. Cerosky, Philip Agree and Arthur Marciante be and it is hereby dismissed and that this action be and it is hereby dismissed finally against each of said defendants, and that said defendants have and recover their costs in this action as said costs may hereafter be taxed, and have execution therefor.

Dated: New York, New York, June 21, 1962.

Archie O. Dawson, U. S. D. J.

Judgment Entered June 21, 1962.

Herbert A. Charlson, Clerk.

IN UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Docket No. 60-1990

PAUL S. GIBERMAN and GERTRUDE GIBERMAN, Plaintiffs,

against

CARVEL STORES OF NEW YORK, INC., CARVEL DARI-FREEZE STORES, INC., CARVEL CORPORATION, CARVEL STORES OF PENNSYLVANIA, CARVEHICLE CORPORATION, CHAIN LOCATIONS OF AMERICA, INC., RAKESTRAW'S DAIRY PRODUCTS, INC., MOHAWK CONTAINER COMPANY, INC., THOMAS CARVEL, FRED VETTEL, JR., GEORGE P. CLARK, ROBERT J. SHALLIS, AGNES CARVEL, DARROW NUTT, ANN M. McHUGH, STANLEY W. TOWNSEND, BRUCE CARVEL, MILDRED ARCADIPANE, RICHARD A. CEBOSKY, PHILIP AGREE and ARTHUR MARCIANTE, Defendants.

JUDGMENT—June 19, 1962

This action, together with other actions consolidated for trial, having duly come on for trial before the Court, without a jury, on March 19, 20, and 21, 1962 and the Court, after considering all the evidence adduced by the respective parties and the briefs submitted by their respective counsel and after due deliberation, having on June 8, 1962 filed its opinion in writing containing its findings of fact and conclusions of law and having directed therein:

"1. Judgment shall be entered dismissing the actions against the following supplier defendants: Eagle Cone Corporation, H. P. Hood & Sons, Inc., Mohawk Container Company, Inc. and Rakestraw's Dairy Products, Inc.;

2. Judgment shall be entered dismissing the actions of the plaintiffs against the individual defendants named in the complaints:

3. Judgment shall be entered dismissing the actions of Lester N. Modick and Harriet M. Modick, of James Ossola and Elizabeth G. Ossola, of Joseph P. Phelan, of James P. Pierce, and Rita Pierce, and Sol Rodens, of Matthew Seu and Jane L. Seu, of Paul S. Giberman, and Gertrude Giberman, and of Joseph Pazdro and Yolanda Pazdro;

Plaintiffs in the Susser, McCoy, Mueller and Frederick cases shall be entitled to a trial on the issue of damages arising out of any restrictions imposed by Carvel on prices to be charged by said plaintiffs for the periods beginning within four years prior to the filing of the complaints and running up to February 27, 1956; such trial to be set at the early convenience of the Court."

And the Court in its opinion having directed further:

"In accordance with Rule 54(b) the Court directs that final judgments may be entered as to all of the causes of action hereinabove referred to. The Court finds there is no good reason for delay in the entry of such judgments;

Let judgments be entered accordingly."

And in accordance with Paragraph numbered 1 of the Court's direction above referred to, it is hereby

Adjudged: That all claims of the plaintiffs in the complaint in this action against Mohawk Container Company, Inc. and Rakestraw's Dairy Products, Inc. be dismissed and that this action be dismissed finally against each of said defendants and that each of said defendants recover its costs against the plaintiffs as may be properly taxed hereafter in this action.

Dated: New York, N. Y., June 19th, 1962.

Archie O. Dawson, U. S. D. J.

Judgment entered this 21st day of June, 1962.

Herbert A. Charlson, Clerk.

IN UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

60 Civ. 2042

JOSEPH PAZDRO and YOLANDA PAZDRO, Plaintiffs,

against

CARVEL STORES OF NEW YORK, INC., CARVEL DARI-FREEZE STORES, INC., CARVEL CORPORATION, CARVEL STORES OF PENNSYLVANIA, INC., CHAIN LOCATIONS OF AMERICA, INC., ILLINOIS BAKING CORPORATION, RAKESTRAW'S DAIRY PRODUCTS, INC., MOHAWK CONTAINER COMPANY, INC., BURRY BISCUIT CORPORATION, RICHARDSON CORPORATION, THOMAS CARVEL, FRED VETTEL, JR., GEORGE P. CLARK, ROBERT J. SHALLIS, AGNES CARVEL, DARROW NUTT, ANN M. MCHUGH, STANLEY W. TOWNSEND, BRUCE CARVEL, MILDRED ARCADIPANE, RICHARD A. CZROSKY, PHILIP AGREE and ARTHUR MARCIANTE, Defendants.

JUDGMENT—June 21, 1962

This action having come on for trial on the merits before the Court without a jury and a trial having been had on December 20, 21, and 22, 1961 on plaintiffs' claims for damages for fraud and deceit set forth as First and Second Causes of Action, and the Court, upon consideration of the evidence introduced therein, the arguments, motions and briefs of counsel for the respective parties, having made a decision adverse to the plaintiffs, and filed an "Opinion, Findings of Fact and Conclusions of Law" dated February 7, 1962, and

A trial having been had on the merits before the Court without a jury on March 19, 20 and 21, 1962, on plaintiffs' claims for damages under the antitrust laws set forth as Third and Fourth Causes of Action, and the Court, upon consideration of the evidence introduced therein, the arguments, motions and briefs of counsel for the respective

parties, having made a decision adverse to the plaintiffs and filed an Opinion dated June 7, 1962, constituting and incorporating findings of fact and conclusions of law, and having made an express determination that there is no just reason for delay and an express direction for the entry of judgment, and upon due deliberation, it is

Ordered and adjudged that the plaintiffs take nothing by this action; that each and every claim for relief stated in the complaint in this action against Carvel Stores of New York, Inc., Carvel Dari-Freeze Stores, Inc., Carvel Corporation, Carvel Stores of Pennsylvania, Inc., Chain Locations of America, Inc., Thomas Carvel, Fred Vettel, Jr., George P. Clark, Robert J. Shallis, Agnes Carvel, Darrow Nutt, Ann M. McHugh, Stanley W. Townsend, Bruce Carvel, Mildred Arcadipane, Richard A. Cerosky, Philip Agree and Arthur Marciante be and it is hereby dismissed and that this action be and it is hereby dismissed finally against each of said defendants, and that said defendants have and recover their costs in this action as said costs may hereafter be taxed, and have execution therefor.

Dated: New York, New York, June 21, 1962.

....., U. S. D. J.

Judgment Entered June 21, 1962.

....., Clerk.

IN UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Docket No. 60 Civ. 2042

JOSEPH PAZDRO and YOLANDA PAZDRO, Plaintiffs,

against

CARVEL STORES OF NEW YORK, INC., CARVEL DARI-FREEZE STORES, INC., CARVEL CORPORATION, CARVEL STORES OF PENNSYLVANIA, INC., CHAIN LOCATIONS OF AMERICA, INC., RAKESTRAW'S DAIRY PRODUCTS, INC., MOHAWK CONTAINER COMPANY, INC., THOMAS CARVEL, FRED VETTEL, JR., GEORGE P. CLARK, ROBERT J. SHALLIS, AGNES CARVEL, DARROW NUTT, ANN M. McHUGH, STANLEY W. TOWNSEND, BRUCE CARVEL, MILDRED ARCADIPANE, RICHARD A. CEROSKY, PHILIP AGREE and ARTHUR MARCIANTE, Defendants.

JUDGMENT—June 19, 1962

This action, together with other actions consolidated for trial, having duly come on for trial before the Court, without a jury, on March 19, 20 and 21, 1962 and the Court, after considering all the evidence adduced by the respective parties and the briefs submitted by their respective counsel and after due deliberation, having on June 8, 1962 filed its opinion in writing containing its findings of fact and conclusions of law and having directed therein:

"1. Judgment shall be entered dismissing the actions against the following supplier defendants: Eagle Cone Corporation, H. P. Hood & Sons, Inc., Mohawk Container Company, Inc. and Rakestraw's Dairy Products, Inc.;

2. Judgment shall be entered dismissing the actions of the plaintiffs against the individual defendants named in the complaints;

3. Judgment shall be entered dismissing the action of Lester N. Modick and Harriet M. Modick, of James Ossola and Elizabeth G. Ossola, of Joseph P. Phelan, of James P. Pierce, and Rita Pierce and Sol Rodens, of Mathhew Seu and Jane L. Seu, of Paul S. Giberman and Gertrude Giberman, and of Joseph Pazdro and Yolanda Pazdro;"

4. Plaintiffs in the Susser, McCoy, Mueller and Frederick cases shall be entitled to a trial on the issue of damages arising out of any restrictions imposed by Carvel on prices to be charged by said plaintiffs for the periods beginning within four years prior to the filing of the complaints and running up to February 27, 1956; such trial to be set at the early convenience of the Court.

And the Court in its opinion having directed further:

"In accordance with Rule 54(b) the Court directs that final judgments may be entered as to all of the causes of action hereinabove referred to. The Court finds there is no good reason for delay in the entry of such judgments;

Let judgments be entered accordingly."

And in accordance with Paragraph numbered 1 of the Court's direction above referred to, it is hereby

Adjudged: That all claims of the plaintiffs in the complaint in this action against Mohawk Container Company, Inc. and Rakestraw's Dairy Products, Inc. be dismissed and that this action be dismissed finally against each of said defendants and that each of said defendants recover its costs against the plaintiffs as may be properly taxed hereafter in this action.

Dated, New York, N. Y., June 19th, 1962.

Archie O. Dawson, U. S. D. J.

Judgment Entered June 21, 1962.

Herbert A. Charlson, Clerk.

[File endorsement omitted]

IN UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 28206

Civil File No. 150-212

BERNARD SUSSER, GERTRUDE SUSSER and SHIRLEY SCHWARTZ,
Plaintiffs-Appellants,

against

CARVEL CORPORATION, CARVEL DARI-FREEZE STORES, INC., CARVEL STORES REALTY CORPORATION, EAGLE CONE CORPORATION, H. P. HOOD & SONS, Defendants-Appellees.

Civil File No. 152-119

LESTER N. MODICK and HARRIET M. MODICK,
Plaintiffs-Appellants,

against

CARVEL STORES OF NEW YORK, INC., CARVEL CORPORATION, CARVEL DARI-FREEZE STORES, INC., EAGLE CONE CORPORATION, H. P. HOOD & SONS, Defendants-Appellees.

Civil File No. 152-120

MARTHA M. McCOY and FRANK T. McCOY,
Plaintiffs-Appellants,

against

CARVEL CORPORATION, CARVEL DARI-FREEZE STORES, INC., CARVEL STORES REALTY CORPORATION, EAGLE CONE CORPORATION, H. P. HOOD & SONS, Defendants-Appellees.

Civil File No. 153-193

JAMES OSSOLA and ELIZABETH G. OSSOLA,
Plaintiffs-Appellants,

against

CARVEL STORES OF NEW YORK, INC., CARVEL DARI-FREEZE STORES, INC., CARVEL STORES REALTY CORPORATION, EAGLE CONE CORPORATION, H. P. HOOD & SONS, Defendants-Appellees.

Civil File No. 153-194

JOSEPH P. PHELAN, Plaintiff-Appellant,

against

CARVEL STORES OF NEW YORK, INC., CARVEL DARI-FREEZE STORES, INC., CARVEL STORES REALTY CORPORATION, EAGLE CONE CORPORATION, H. P. HOOD & SONS, Defendants-Appellees.

Civil File No. 60 Civil 63

JAMES P. PIERCE, RITA PIERCE, LYLE FREDERICK, LEROY M. FREDERICK, ALFRED MUELLER and SOL RODENS, Plaintiffs-Appellants,

against

CARVEL STORES OF NEW YORK, INC., CARVEL DARI-FREEZE STORES, INC., CARVEL CORPORATION, CARVEL STORES OF PENNSYLVANIA, INC., CHAIN LOCATIONS OF AMERICA, RAKESTRAW'S DAIRY PRODUCTS, INC., Defendants-Appellees.

Civil File No. 60 Civil 1096

MATTHEW SEU and JANE L. SEU, Plaintiffs-Appellants,

against

CARVEL CORPORATION, CARVEL STORES OF NEW YORK, INC., CARVEL DARI-FREEZE STORES, INC., CARVEL STORES REALTY CORPORATION, EAGLE CONE CORPORATION, H. P. HOOD & SONS, Defendants-Appellees.

Civil File No. 60 Civil 1990

PAUL S. GIBERMAN and GERTRUDE GIBERMAN, Plaintiffs-Appellants,

against

CARVEL STORES OF NEW YORK, INC., CARVEL DARI-FREEZE STORES, INC., CARVEHICLE CORP., CARVEL CORPORATION, CARVEL STORES OF PENNSYLVANIA, INC., CHAIN LOCATIONS OF AMERICA, INC., RAKESTRAW'S DAIRY PRODUCTS, INC., Defendants-Appellees.

Civil File No. 60 Civil 2042

JOSEPH PAZDRO and YOLANDA PAZDRO, Plaintiffs-Appellants,

against

CARVEL STORES OF NEW YORK, INC., CARVEL DARI-FREEZE STORES, INC., CARVEL CORPORATION, CARVEL STORES OF PENNSYLVANIA, INC., CHAIN LOCATIONS OF AMERICA, INC., RAKESTRAW'S DAIRY PRODUCTS, INC., Defendants-Appellees.

Appendix of Appellee Eagle Cone Corporation

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

COLLOQUY PRIOR TO READING OF VETTEL DEPOSITION

(3428) Mr. Yarnell: I am offering these as admissions by Mr. Vettel. As to the fact that it was in another action, I don't believe that restricts me so far as Carvel is concerned.

The Court: In so far as Carvel is concerned, that is certainly true. As to the supplier defendants, they haven't had a chance to cross-examine.

(3429) The Court: Then this testimony is offered against the Carvel defendants. I will take it only against the Carvel defendants and not binding on the supplier defendants.

COLLOQUY ON MOTION OF EAGLE CONE CORPORATION TO DISMISS AT END OF PLAINTIFFS' CASE

(3440) Mr. Harriton: Your Honor, Eagle Cone moves to dismiss the plaintiffs' complaint on the basis of the supply contracts between Carvel Dari-Freeze and Eagle Cone and Carvel's Stores of New York on the affidavit of Martin Cain.

(3441) Mr. Harriton: May I respectfully submit, Your Honor, that plaintiffs have not presented one whit of evidence to show that Eagle— That this supply contract was illegal in any respect whatsoever. That there is no price-fixing by which Carvel dealers were charged for their cones. All the contract demonstrates is that Eagle shall prepare invoices at the prices which Carvel shall charge the dealers.

Eagle had no discretion with respect to the price Carvel would charge dealers.

The Court: Where are the contracts with Eagle Cone?

Mr. Harriton: It is in evidence, Plaintiff's Exhibits 11 and 12.

I also point out to Your Honor that not one scintilla of evidence was proffered by the plaintiff here to show any agreements between Eagle Cone and Carvel, that Eagle did not deal directly with dealers. Your Honor will also note that the contracts do not provide anywhere therein that Eagle would not deal directly with the plaintiff and it is quite surprising to me, Your Honor, that if a request that Eagle sell cones directly to the Carvel dealers was of such earth- (3442) shaking magnitude that these dealers never put such a request in writing.

They have not submitted any such evidence in writing today and upon all of the plaintiffs' case, I submit that they have not made out a claim in point of law, and therefore the case against Eagle Cone should be dismissed.

(3443) The Court: What is the basis of your suit against Eagle Cone?

Mr. Yarnell: Your Honor, we believe that the agreement between Eagle Cone and Carvel evidences, first a knowledge on the part of Eagle Cone of the restrictive provisions of the franchise agreement with the operators, and also an agreement by Eagle Cone that they will not sell any merchandise direct to the operators nor will they sell the operators any, even Carvel-approved merchandise, except—

The Court: Where do they say that?

Mr. Harriton: Your Honor, may I point out—

Mr. Yarnell: May I see the agreements, please?

The Court: Yes.

Mr. Yarnell: Your Honor, one item I would like to call your Honor's attention to is in Exhibit 11 at page 3, the first subparagraph, B, at the top.

Mr. Harriton: May I see that?

Mr. Yarnell: Yes.

The Court: You mean the provision, "The supplier agrees to produce cones of the said design only to Carvel and to no other person"?

Mr. Yarnell: Yes.

(3444) The Court: What is violative of the law in that?

Mr. Yarnell: If a Carvel store operator who has been permitted to use the name Carvel and all of its insignias and designs in his operation were to try to purchase directly from Eagle Cone his requirements, all those from some approved-Eagle Cone manufactured cones, he could not. Eagle Cone could only sell him through Carvel at a step-up in price, which is provided by the agreement.

The Court: Standing by itself, there is nothing wrong with this: "The supplier agrees to produce cones of the said design only to Carvel and to no other person."

Mr. Yarnell: Standing by itself plus the testimony of Mr. Vettel with respect to the fact that Eagle Cone would not sell anything other than the Carvel-designated cone.

Mr. Harriton: That is not binding on Eagle Cone.

Mr. Weisman: That is not the testimony.

The Court: Standing by itself, the supplier can produce cones only for the one who orders, not for anybody else.

Mr. Weisman: Of a special design.

(3445) The Court: This agreement talks about a special design.

Mr. Harriton: As shown in the attached drawings.

The Court: What other things do you have, Mr. Yarnell.

Mr. Yarnell: Actually there are other cones produced by Eagle as demonstrated by that card which I believe I handed up to your Honor.

The Court: Where is it in the agreement that they won't sell those—

Mr. Yarnell: Which are not a special design, your Honor.

The Court: Is there any agreement that Eagle Cone will not sell those to anybody?

Mr. Harriton: No, your Honor, there isn't.

Mr. Yarnell: They sell it to the general public but not to Carvel operators.

The Court: Where is there any statement that they won't sell those to a franchise operator?

Mr. Yarnell: An agreement between Eagle Cone and Carvel contemplates the fact that the Carvel operators are under agreement with Carvel whereby they will not purchase or be permitted to purchase any cones other than

those which are approved by Carvel and to Carvel specifications.

(3446) The Court: Where does Eagle Cone agree to comply with any such thing?

Mr. Yarnell: The supplier agrees to manufacture and sell to Carvel and Carvel agrees to purchase from the supplier from time to time all of Carvel's requirements of the cones hereinafter described, which Carvel shall furnish to all Carvel stores now located or hereafter located in the territory hereinafter set forth for use in accordance with, as a part of Carvel's frozen dairy product.

The Court: Do you think that is an illegal agreement?

Mr. Yarnell: Not merely that alone, your Honor, without more. I think that where the Eagle Cone people had knowledge of the nature of the agreement—

The Court: I'm not interested in your suit against Carvel in the general picture. I'm interested in the fact that you are claiming damages against Eagle Cone and I want to know what Eagle Cone has done which should subject them to damages.

Mr. Harriton: Your Honor, may I—

The Court: Wait a minute.

Mr. Yarnell: I can't find anything else, your Honor, on that.

(3447) The Court: I will reserve decision on this motion. I don't think you have very much against Eagle Cone on the basis of its agreement.

Colloquy on Summation

(3679) Mr. Rothstein: We say that the clear import of those agreements constitutes an agreement upon their part with Carvel not to sell or deal with the store owners.

The Court: You say that is the illegal provision?

Mr. Rothstein: Yes, sir.

The Court: An agreement that they will provide the requirements of those stores and they will not deal directly but only through Carvel you say is a violation of the antitrust act?

Mr. Rothstein: The agreements such as they are, as they are written.

The Court: Do all of them have such an agreement?

Mr. Rothstein: The Eagle Cone specifically has it.

* * * * * * *

(3682) The Court: What does Eagle Cone have in their agreement?

Mr. Rothstein: The Eagle Cone contract says, as I recall it, that Eagle Cone will produce the products called for in the contract only for Carvel and will sell them to no one else.

The Court: Let me see what that says.

Mr. Rothstein: And also provides that the supplier agrees to manufacture and sell to Carvel all of Carvel's requirements.

The Court: That is not a violation of the anti-trust laws.

Mr. Rothstein: Not in and of itself. I'm referring now to paragraph 4, Subdivision B.

(3683) The Court: Now, paragraph 4 says:

"The supplier agrees to furnish the said cones in the shape and design indicated on the drawing attached hereto of Schedule A and made a part of this agreement. The supplier agrees to produce cones of said design only for Carvel and for no other person".

The design is one that has a particular design to it and particular names on it. Now, is that a violation of the anti-trust laws when they give a design to a manufacturer and employ him to manufacture it and he agrees to manufacture it according to that design, only for the one particular buyer?

Mr. Rothstein: If it was a design, your Honor, which was peculiar to Carvel in that it bore the Carvel trademark or insignia I would grant you that it is no violation. Incidentally, I might say that this is the reason why we initially let Burry out of the case, because we felt that that was their situation: that they produced one product and they actually stamped it with the Carvel name, some Carvel trademark.

The Court: I see.

This design does not have the name Carvel on it. On one of them it has Major and on the other it has Buddy

(3684) Twinkle. If those are used by Carvel can't the manufacturer say, "Well, we'll produce these for Carvel and for nobody else; you have given us this particular design."

Mr. Rothstein: The Buddy Twinkle mark was discontinued very shortly thereafter, according to the affidavit of Martin Cain of Eagle Cone, which we have marked as an exhibit, but we say that where the agreement is made essentially for the stores involved and the agreement between Carvel and the supplier stipulates that no sale will be made to anyone else but Carvel, we say this is an illegal agreement so far as the stores are concerned who are the users of the product.

The Court: Even though this is a special design?

Mr. Rothstein: Yes, sir. This is not a design, as I said before, that has the protection of the Carvel trademark which would warrant it such protection for exclusivity.

The Court: Here is one, Major, which has the swirl in the cone. If Carvel gives them a particular design with the swirl in the cone, can't they say as consideration for giving that design we will manufacture that cone for Carvel and not for anybody else?

(3685) The Court: Where is there anything about the charge?

(3686) Mr. Harriton: Paragraph 8, your Honor.

Mr. Rothstein: Paragraph 8A and B.

Mr. Harriton: There is no price-fixing there, your Honor. There is no agreement there.

The Court: I can't see where there is any price-fixing any more than in any contract where A agrees to sell to B at a certain fixed price. Price-fixing is something which fixes the price in the hands of somebody who has already bought it. There is no agreement here. Eagle Cone simply says: "We will sell at this price." Carvel says: "We will buy at this price." If that contract is illegal, every purchase and sale contract in the country is illegal.

Mr. Rothstein: Granted, your Honor, but we ask you to consider these further matters, which are these: No. 1, the dealer must buy these cones under the franchise contract.

The Court: Where is anything in the Eagle Cone?

Mr. Rothstein: No, not in the Eagle Cone.

The Court: Where is Eagle Cone responsible for that?

Mr. Rothstein: I believe that under the circumstances of the case and in view of the evidence (3687) before you you can fairly and justly draw an inference that Eagle Cone and the other suppliers involved here entered into their respective contracts with Carvel with full knowledge and in contemplation of Carvel's franchise agreements.

The Court: I can't draw that inference unless there is proof. There is no proof. There is proof that Eagle Cone manufacturers cones; that Carvel went to them and said, "We will give you a design. You make the cones for us and we'll buy them at this price and you supply them to our stores." That is the extent of the evidence in the case as far as Eagle Cone is concerned.

Mr. Rothstein: I have reference to this specifically, your Honor. The Eagle Cone-Carvel agreement provides that Carvel will purchase all its requirements from Eagle Cone.

The Court: That is all right. That is legal.

(3688) Mr. Rothstein: I am referring you now, your Honor, to an exhibit which is the affidavit of Martin Cain which we marked here.

* * * * * * * *

(3689) The Court: All right, show me what you are relying on.

Mr. Rothstein: Paragraph 11.

The Court: All right, I will read paragraph 11.

Mr. Rothstein: And paragraph 14, your Honor.

The Court: I will read paragraph 14.

I can't see anything in these paragraphs that shows any liability in Eagle Cone for what Carvel may have done with its franchised dealers.

Is there any other evidence?

Mr. Rothstein: The agreement required Eagle to bill Carvel dealers at the prices agreed upon between Eagle Cone and Carvel.

The Court: That is not a violation.

PLAINTIFFS' EXHIBIT 24.

Affidavit of Martin Cain.

(5768)

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

Civ. No. 152-120

MARTHA M. McCOY and FRANK T. McCOY, Plaintiffs,

against

CARVEL CORPORATION, CARVEL DARI-FREEZE STORES, INC., CARVEL STORES REALTY CORPORATION, MOHAWK CONTAINER COMPANY, INC., EAGLE CONE CORPORATION, H. P. HOOD & SONS, and BURRY BISCUIT CORP., Defendants.

STATE OF NEW YORK,
COUNTY OF NEW YORK, *ss.*:

MARTIN CAIN, being duly sworn, deposes and says:

1. I reside at 303 Beverly Road, Brooklyn, New York.

2. I make this affidavit for the purpose of supplying certain informational background concerning Eagle's relations with Carvel and its dealers and market data in support of defendant. Eagle's motion for summary judgment.

3. I am the sales manager of Eagle Cone Corporation, a domestic corporation (hereinafter called "Eagle"), located at 45 Clinton Avenue, Brooklyn, New York, which maintains a plant and office at that address for the manufacture and distribution of ice cream cones,

4. I have been in the ice cream business for twenty-eight years, having first been employed with "Confectionery & Ice Cream World", a trade publication, located at 99 Hudson Street, New York, New York. I was employed as a

writer and seller of space. My association with Confectionery & Ice Cream World lasted for a term of three years.

5. In 1936 I became associated with Maryland Baking Company of Atlanta, Georgia, as a salesman for that company. My association with Maryland Baking Company of Atlanta terminated in March 1941, at which time I removed to New York to become sales manager of the Eagle Cone Corporation, in which capacity I have remained ever since.

(5769) 6. Because of my long term association with the ice cream business, I am fully experienced in all of its phases, especially with regard to the manufacture and distribution of ice cream cones, and consider myself fully qualified to express opinions and judgments as to any facet thereof.

7. Eagle sells only to four classes of customers: (1) to jobbers, who, in turn, resell to candy stores, grocery stores and other such small retail outlets; (2) to manufacture-retailers, which includes all those who make their own ice cream and sell directly across the counter to the consuming public. Mobile truck units which contain their own ice cream making machines are included in this category. (3) to chain stores and supermarkets; and (4) to wholesale ice cream manufacturers.

8. Eagle owns and maintains its own fleet of trucks for delivery of cones to the above-described category of its customers. For the most part, it sells and delivers directly to customers in the eastern part of the State of New York, Connecticut, New Jersey, Massachusetts, and the eastern part of Pennsylvania.

9. On May 1, 1955 Eagle entered into identical agreements with Carvel Dari-Freeze Stores, Inc. and Carvel Stores of New York, Inc. (hereinafter called "Carvel"). A copy of the Carvel Dari-Freeze Stores, Inc. agreement is included in the papers on this motion. It provides that Eagle is to supply ice cream cones in the State of New York, Connecticut and Massachusetts only. The contract speaks for itself as to the provisions thereof. This contract was

entered into for many reasons advantageous to both parties. Carvel knew that Eagle had the productive capacity to supply its stores during periods of peak demand. Eagle could resort to its affiliated cone manufacturers in the East who could make the special Carvel cones to supply Carvel in (5770) the event of a labor dispute or an Act of God. It was advantageous to Carvel to be supplied by a company that owned and maintained a fleet of trucks to ervice its stores no matter where they are located. Carvel also knew it would obtain cones made of high quality flour and other ingredients to assure the acceptance of its taste and flavor by the consuming public. The contract was also advantageous to Eagle because it assured a stable market for it to sell. This factor was especially attractive to Eagle because of the fierce competitive nature of the cone industry where orders are given on an "as-needed" basis. The agreement, calling for all of Carvel's requirements of cones to be supplied by Eagle is unique in the industry. Very few, if any, of Eagle's fifteen major competitors who supply the above described tri-state area have such contracts with their customers. By virtue of this contract, Eagle could anticipate Carvel's requirements so as to have in stock adequate supplies of finished goods and raw materials to assure continued supply of cones to Carvel operators during periods of peak demand. Further, Eagle's selling expenses were reduced.

10. The contract, by its terms was to be operative for a period of one year, automatically renewable, unless ninety days' notice of cancellation by either party is given. The price to Carvel on the "Major" small type cones was $4.70 per thousand, and on the "Buddy Twinkle" large type cones was $9.50 per thousand. The contract called for Eagle to deliver Carvel invoices, printed at Eagle's own expense, stating the prices at which Carvel charged its dealers on their purchases of cones. Carvel's price to its dealers on cones was $4.95 per thousand on the "Major" small type cone and $10.00 per thousand on the "Buddy Twinkle" large type cone. Actually, the "Buddy Twinkle" went out of use shortly after the contract was (5771) signed and was substituted by our "No. 40 cake cup cone",

which was sold to Carvel at $4.56 per 600 and listed on the invoices delivered with each shipment at $4.80 per 600 as the charge by Carvel to the dealer. Later, other type cones were sold by Eagle to Carvel, after negotiations were held between the parties. As to such cones, Eagle supplied Carvel's requirements thereof substantially in accordance with the terms of the written contract.

11. Eagle was agreeable to establishing a new price bracket to a substantial account such as Carvel for the reason that it would be relieved of services which theretofore were always provided by Eagle at its own expense to its customers. Thus Eagle was relieved of furnishing all point of sale materials, including advertising and merchandise posters, to the Carvel stores, which Eagle normally supplies gratis. Further, since Eagle billed Carvel, Carvel was responsible alone for the payment of its bills. This relieved Eagle of the responsibility of credit service to each store individually as a separate account. Because Carvel would notify Eagle of the opening of new Carvel stores, it saved the time of Eagle salesmen in ferreting out new accounts. The reduction in sales expenses, by having Carvel compose and print its own advertising materials and the savings in salaries for additional salesmen and the reduction of work burden of its existing salesmen in soliciting new accounts, has been quite substantial and more than justifies the arrangements made under the contract.

12. Pursuant to paragraph 19(b) of the contract, which both parties understood to apply to price increases as well as price reductions, Eagle increased its prices to Carvel in the Spring of 1956 and in the Spring of 1958. These price increases were necessitated by the increase in costs for flour, sugar, labor, etc.

13. The contract was negotiated by your deponent and Carvel officials in some five separate sessions (5772) over a substantial period of time. Similar negotiations took place later as to cones not covered by the contract. The only subject of these negotiations were the matters covered by the agreements. I specifically deny that there were any

understandings extrinsic to the contract relating to any restraint allegedly imposed on Carvel dealers such as preventing them from obtaining their cone supplies elsewhere, to deal directly with Eagle, to compel them to obtain their cones through Carvel, or to create artificial price levels at which they bought their cones. In short, Eagle had nothing to do with the dealers or with their franchise agreement with Carvel, except to deliver cones to them per its agreement with Carvel.

14. The only function of Eagle salesmen with respect to Carvel retail dealers was to service the supply of cones to them. This would take the form of receiving and adjusting complaints, usually with respect to breakage of cones, a very fragile item. Also, Eagle salesmen would ascertain the reasons for delays in delivery and take steps to assure that in the future deliveries of cones would be made promptly.

15. Neither of the plaintiffs ever asked me in 1955 or at any other time for direct supply and billing. I have asked my salesmen and members of the office staff if plaintiffs ever visited our office in its old location in the Bronx and its present office to request direct dealing by Eagle with them. All replied in the negative.

16. The tri-state area (New York, Connecticut and Massachusetts) can be readily supplied by all those manufacturers of ice cream cones who have plants or their own warehouses within a 400 mile radius thereof. Eagle has 15 major competitors who supply customers in this area on the same basis as does Eagle. They are:

1. National Biscuit Co.—warehouse in every large city within the 400 mile radius.

2. S & S Cone Co.—Bronx, N. Y.

(5773) 3. Illinois Baking Co.—warehouses and distributors spotted at various locations within 400 mile radius.

4. Crown Baking Co.—Malden, Mass.

5. Automatic Cone Co.—Boston, Mass.

6. Yohay Baking Co.—Brooklyn, N. Y.
7. Grade A Sugar Cone Co.—Boston, Mass.
8. Consolidated Cone Co.—Brooklyn, N. Y.
9. Paramount Baking Co.—Jersey City, N. J.
10. Reynolds Co.—Rochester, N. Y.
11. A Towanda, N. Y., manufacturer.
12. Another Towanda, N. Y., manufacturer.
13. Martino Cone Co.—Philadelphia, Pa.
14. Jacovelli Cone Co.—Philadelphia, Pa.
15. Sandler Cone Co.—Baltimore, Md.

17. The term "readily supply" is used to convey the meaning that in this industry quick service is necessitated by the limited warehouse space of distributor-customers. They wish and they need to be supplied quickly. Further, manufacturer-retailers need quick service because their at-hand supplies are speedily diminished by the demands of the consuming public during the summer season. It is for this reason that I have arrived at the conclusion that the tri-state area can be readily supplied only by those manufacturers of ice cream cones who are located within a 400-mile radius of the tri-state area. A supplier can deliver cones to a customer conveniently a few days within receipt of an order from any point within this radius. Deliveries from points outside the 400 mile area would make transportation costs prohibitive on a less than carload basis. No cone manufacturer is located close enough to the outer limits of this 400-mile radius so as to enable itself to conveniently deliver supplies within a few days of re- (5774) ceipt of an order at a cost of transportation tolerable to its customers who are within the tri-state area and particularly to those customers who operate in the State of Connecticut.

18. There are no statistics or economic analyses maintained for or by the cone industry. The only cone statistics existing are published by the U. S. Department of Com-

merce which are based on a national level. They are not further broken down on a regional or state by state basis in any reliable manner. I base this conclusion upon my long experience in this business, my former employment with a trade publication and my continuous contacts with persons connected therewith. Further, as Eagle is a somewhat substantial producer and supplier of ice cream cones, information would have to be forthcoming from it in order to present an accurate, reliable picture of the industry in this area. No organization, governmental or otherwise has ever requested Eagle to furnish information regarding its production, gross sales, and dollar volume amount, etc. Therefore, I am of the opinion that I am as expert as anyone who can provide such statistical information.

19. Over the past six years the average quantity of cones of all types sold by manufacturers in the tri-state area has averaged 1,250,000,000 per year. The total dollar volume amount of sales for this period has averaged $11,000,000 per year. Sales are made by Eagle and its competitors to wholesale jobbers, wholesale producers of soft and hard ice cream, ice cream manufacturer-retailers and to chain stores and supermarkets on a mass quantity basis. Carvel's average purchases from Eagle for that period amounted to approximately 15,000,000 cones per year. Thus Carvel's quantity purchases of cones amounted only to 7/10ths of 1% of the total cones purchased in the tri-state area. Eagle's dollar volume amount of sales to Carvel has averaged $115,000 per year since 1955. The (5775) percentage of dollar volume sales by Eagle to Carvel thus amounts only to about 1% of the total in the New York-Massachusetts-Connecticut territory.

20. The above estimated quantity of volume encompassing both quantity of cones sold and dollar amount of sales in the tri-state area is based upon my long experience in the business, from my personal observations and talks with my customers. I also base my estimate upon the productive capacity of Eagle's fifteen major competitors as known by me. Productive capacity is calculated by the number of cone machines a company operates. It is a mat-

ter of common knowledge within the industry as to the number of machines that are operated by each company in a particular area. Information-gathering of this sort is simplified by the fact that there is only one major cone machine manufacturing company in the nation. It is the Turnbull Cone Company of Chattanooga, Tennessee. When a cone manufacturer purchases a new machine it becomes known quickly throughout the trade. Salesmen of box and flour manufacturers who visit me often bruit about this type of information. They also serve as a sounding board throughout the industry as to whether a cone company has increased its sales and thus increased its production. If so, it is often divulged that such company has brought new cone-making machines. In the same fashion, it is often learned from them that a competitor is about to offer a new item. A new item usually demands a new type of mold which in turn necessitates the purchase of a new type machine. When I put together all of the above information, I obtain a most accurate picture of the productive capacity of my competitors.

21. Most cone manufacturers produce 40 cases of cake cones containing either 1000 or 600 cones per case depending upon the size of the cone in an 8-hour shift. (5776) Forty sugar cones per minute per machine can be produced in any 8-hour shift. Many plants in the industry operate all or some of their machines at various times to as much as 24 hours per day. Eagle Cone is within this category as are reputed to be many other companies.

22. The following companies have the estimated amount of machines to make ice cream cones:

National Biscuit	25
S & S Cone	25
Illinois Baking	10
Eagle	9
Paramount Baking	5
Yohay Baking	5
Consolidated Cone	4
Sandler Cone	4

Grade A. Cone	3
Crown Baking	2 or 3
Martino Company	2 or 3
Jacovelli Company	2 or 3
Reynolds Cone	2 or 3
Towanda Manufacturers (2)	2 each
Automatic Cone	2

23. My estimate as to the total sales of cones in New York, Massachusetts and Connecticut is also based upon certain data regarding the consumption of ice cream itself. Thus, the total ice cream consumed in the tri-state area as compiled by the International Association of Ice Cream Manufacturers of Washington, D. C., amounted to 118,948,000 gallons in 1960. This total represents the composite of all those companies which reported their figures. Obviously, some did not so report, so the above total can be presumed to be conservatively stated. It has been estimated that of the total ice cream manufactured 20% thereof or 24,000,000 gallons is consigned to the bulk category. Of this bulk gallonage, it is estimated that 30% or 7,200,000 gallons ultimately is dipped into cones. A gallon of ice cream will yield an average of 25 dips into cones. Therefore, 1,800,000,000 cones were dipped in the tri-state area in 1960. Carvel purchased 17,000,000 cones from Eagle in 1960. Therefore, (5777) in 1960, Carvel's purchases amounted to less than 1% of the total in the tri-state area.

24. Less cones were sold in the tri-state area, and indeed, nation-wide in 1958-1959 and less before that time. This is the reason why an average of 1,200,000,000 as the quantity of cones sold since 1955 in the tri-state area was given above. The cone industry has grown by leaps and bounds since 1955. This has been due to recent innovations, such as packaged cones sold to housewives by the supermarkets, the tremendous growth of mobile units containing their own ice cream making machines and the expansion of ice cream outlets to merchandising chains which often also have their own ice cream making machines. In addition is the new mechanical technique whereby ice cream

is filled into cones automatically. The complete ice cream cone is then immediately frozen. The item is sold ready made to various retailer customers. All of this explains why the national sales of cones jumped $10,000,000 between 1954 and 1958. The growth between 1958 and 1961 has far exceeded that increase, and now approximates an amount of $45,000,000 yearly throughout the United States.

25. Eagle ships cones to Carvel for 250 of its dealers in the tri-state area. This represents only 250 ice cream outlets out of a total of 125,000 where ice cream in cones may be purchased by the consuming public. Thus the Carvel outlets represent only 1/5 of 1% of the total outlets in the tri-state territory. The figure of 125,000 outlets is based upon several factors. For example it is a matter of knowledge in the industry that the Pioneer Division of the Borden Company sells ice cream to 10,000 accounts or more in the tri-state area where ice cream cones are purchasable. Similarly, General Ice Cream Co. has in excess of 20,000 accounts. H. P. Hood & Sons sells to 4,000 or more accounts.

26. The 125,000 outlets include operations (5778) similar to the Carvel system. In this category are "Dairy Queen", "Tastee Fr ez", "Dari-Delite", "King Kone", "Dari-Isle" and other smaller chains as well as thousands of independents who operate in the tri-state area. These independents purchase ice cream making equipment from such national companies as Port Morris Machine Co., General Equipment Co., Taylor Freezer Co., Sweden Freezer Co., King Freeze Co. and the Emery-Thompson Co. The total outlets also include mobile unit franchises such as "Mr. Softee", "Tastee Freez", "Freezer Fresh" and hundreds of non-franchised operators which have their own ice cream making machines. Also numbered among the total outlets are thousands of manufacturer-retailers who have purchased similar equipment. Also making their own ice cream are nationally syndicated chain stores such as Woolworth and S. H. Kress & Co. The total outlets also embrace such companies as "Good Humor", "Judy Ann",

"Bungalow Bar", and thousands of other independent operators of trucks and carts selling factory filled ice cream cones. Additionally, there are many hard ice cream chains such as Howard Johnson and Friendly Ice Cream Co. and hundreds of other independent manufacturer-retailers of that character. Eagle solicits business from as many of the above described outlets as its resources allow.

27. Eagle's gross sales have averaged about $630,000 per year since 1955. Of this amount, $500,000 represents the average dollar amount of sales in the tri-state area. Thus Eagle's dollar share in the tri-state area represents less than 5% of the total. I know that National Biscuit Company and S & S Cone Co. do a larger business overall than does Eagle in this market. Each sells to the extent of about 20% therein.

28. Our Carvel duplicate invoices in our files indicate that plaintiffs, Frank and Martha McCoy, were sold and charged by Carvel for the following quanti- (5779) ties of cones at the following prices:

June 28, 1955—Sept. 30, 1955—	62 cases—	$ 315.60
Oct. 1, 1955—Sept. 30, 1956—	70 cases—	354.15
Oct. 1, 1956—Sept. 30, 1957—	91 cases—	494.50
Oct. 1, 1957—Sept. 30, 1958—	76 cases—	347.70
Oct. 1, 1958—Sept. 30, 1959—	107 cases—	621.10
Oct. 1, 1959—Sept. 30, 1960—	83 cases—	395.12
Oct. 1, 1960—July 31, 1961—	70 cases—	404.25

29. Your deponent sets forth the above figures in order to demonstrate the obvious infinitestimal proportion of purchases the plaintiffs have made in the tri-state market area with relation not only to Eagle's total sales amounts but also with respect to the total gross quantity and dollar amount of sales by all cone suppliers for the aforesaid market.

WHEREFORE, your deponent respectfully requests that the motion of defendant, Eagle Cone Corporation, for summary judgment in its favor be granted.

MARTIN CAIN

Sworn to before me this
30th day of August, 1961

PAUL J. HARRITON

PAUL J. HARRITON
Notary Public, State of New York
No. 31-6786900
Qualified in New York County
Commission Expires March 30, 1962

(5785)

(5788) Contract

AGREEMENT made this 1st day of May, 1955, by and between CARVEL DARI-FREEZE STORES, INC., a Corporation of the State of New York, with offices at 80 Woodworth Avenue, Yonkers, New York (hereinafter designated as "Carvel"), and EAGLE CONE CORPORATION, a Corporation of the State of New York, with offices at 805 East 140 Street, New York City, New York (hereinafter designated as "Supplier").

WITNESSETH:

WHEREAS, Carvel supplies the ingredients for Carvel's Frozen Dairy Product to its franchised dealers (hereinafter sometimes referred to as "Carvel Dealers"), for sale and distribution in Carvel Stores, in accordance with Carvel specifications and subject to Carvel's inspection and supervision; and

WHEREAS, Carvel's specifications call for the sale of Carvel's Frozen Dairy Product in various forms and containers, including cones of specified design particularly

suitable as receptacles for Carvel's Frozen Dairy Product, and of high quality; and

WHEREAS, a distinct and uniform design of the cones is desirable for the protection of the public which relies, among other factors, on the characteristic appearance of the cones as an additional indication that it is part of Carvel's Frozen Dairy Product; and

WHEREAS, the Supplier is engaged in the manufacture and sale of cones and desires to supply Carvel cones (5789) according to Carvel's specifications and in quantities as ordered by Carvel, subject to the terms and conditions hereinafter set forth,

NOW, THEREFORE, in consideration of the foregoing and of the mutual covenants hereinafter contained, it is mutually agreed as follows:

1. MANUFACTURE OF CONES:

The Supplier agrees to manufacture and sell to Carvel, and Carvel agrees to purchase from the Supplier, from time to time, all of Carvel's requirements of the cones hereinafter described which Carvel shall furnish to all Carvel Stores now located, or hereafter located, in the territory hereinafter set forth, for use in accordance with, and as a part of, Carvel's Frozen Dairy Product.

2. TERRITORY:

The territory mentioned in the foregoing paragraph shall be the following: New York State, Connecticut, Massachusetts.

3. TYPE OF CONES:

The Supplier agrees to furnish hereunder the following types of cones:

(a) a cone of 4¾" height and 2¼" outside diameter on top (commonly known as "10 cent size")

(b) a cone of 4¾" height and 3" outside diameter on top (commonly known as "20 cent size")

(5790) 4. DESIGN OF CONES; EXCLUSIVENESS:

(a) The Supplier agrees to furnish the said cones in the shape and design indicated on the drawing attached hereto as Schedule A, and made a part of this agreement.

(b) The Supplier agrees to produce cones of the said design only for Carvel, and for no other person.

5. COMPOSITION AND QUALITY OF CONES:

The Supplier agrees to furnish cones made of cake and pastry flour, tapioca flour, sugar, honey, shortening, salt, leavening and vanillin, of a quality no less good than the standard quality cones produced by the Supplier at the time of the execution of this agreement. The Supplier represents and warrants that sample cones submitted to Carvel before the execution of this agreement, for inspection and testing, are such standard quality cones.

6. INSPECTION:

Carvel will, from time to time, test and inspect the cones for uniformity of appearance and for adherence to the quality standards set forth herein.

7. DELIVERY:

(a) The Supplier agrees to deliver, at its own cost and expense, all orders for cones as promptly as possible, to Carvel, or to designated Carvel Stores within the aforesaid territory. Delivery shall be in accordance with instructions received from Carvel or from persons authorized from time to time by Carvel to give such instructions, including Carvel Dealers.

(5791) (b) All deliveries shall be made in suitable corrugated cartons or other packaging, imprinted with Carvel's name and trade mark, in such forms and with such text as Carvel may from time to time prescribe. The cartons or other packaging shall be supplied by the Supplier without additional charge. Carvel shall cooperate with the Supplier by supplying artist's layouts with Carvel's trade mark for the marking of the cartons or other packaging.

(c) The Supplier agrees to take all suitable action to insure that its distributors, routemen, delivery men or other agents and employees shall not represent themselves as agents or employees of Carvel.

8. Invoices:

(a) The Supplier, at its own expense, shall print Carvel invoice-forms as prescribed by Carvel. A sample of the invoice presently in use is annexed hereto, but Carvel reserves the right to change the invoice-forms from time to time.

(b) The Supplier agrees to prepare invoices, on Carvel's invoice forms and in accordance with Carvel's instructions, addressed to the various Carvel Dealers, and to deliver the same to the Carvel Dealers with each delivery of cones to which they refer. The invoices shall list the quantities of cones shipped and the following prices which Carvel charges to the Carvel Dealers:

Small Type Cone—$4.95 per thousand
Large Type Cone—$10.00 per thousand

(5792) Carvel may, however, instruct the Supplier, from time to time, to mark different prices than those listed above.

9. Bonus Coupons:

The Supplier agrees to furnish with each case of cones delivered a printed bonus form in the value of 5% of the invoice price to the Carvel Dealer indicating that the Carvel Dealer receiving the delivery shall be entitled to receive a case of cones without charge upon surrender of the requisite number of bonus coupons. The bonus cases shall be supplied by the Supplier without additional charge either to Carvel or to the Carvel Dealer, it being the intention of the parties that the furnishing of the bonus cases shall be part of the obligations of the Supplier hereunder. The text of the bonus forms shall be as supplied by Carvel from time to time after consultation with the Supplier. Bonus forms shall be printed by the Supplier at its own expense.

10. PRICE:

(a) Carvel agrees to pay to the Supplier $9.50 per thousand for the large type cones and $4.70 per thousand for the small type cones. The Supplier represents that this price is no higher than the average competitive price in the territory described herein at the time of the execution of this agreement. This price shall not be changed during the term of this agreement except as hereinafter set forth.

(b) It is further agreed that the prices set forth in subparagraph A of this paragraph 10 may be reviewed by Carvel at the beginning of every calendar quarter, and if (5793) found that the average competitive price charged by the supplier's major competitors' cones of substantially the same size and quality, sold in the Supplier's territory, are lower than the price hereinbefore referred to, then the Supplier and Carvel agree to reduce the price or prices of either or both cones dealt hereunder to the level of such average competitive price or prices. Such reduced price or prices shall be effective for the following calendar quarter without further change.

(c) It is further agreed that in the event of war or national emergency declared by the President of the United States by proclamation, that the prices referred to in subparagraph A of this paragraph 10 or other prices then currently in effect may be reviewed by the Supplier at the beginning of every calendar quarter during such war or national emergency, and if found that the average competitive price charged by the Supplier's major competitors for cones of substantially the same size and quality, sold in the Supplier's territory are higher than the price or prices hereinbefore referred to, then the Supplier and Carvel agree that the price or prices of either or both cones dealt with hereunder shall be increased to the level of such average competitive price or prices. Such increased price or prices shall be effective for the following calendar quarter without further change.

11. PAYMENT:

Carvel shall pay for the cones as delivered on the 1st day of each and every month, upon statement rendered.

(5794) 12. DELEGATION OF AUTHORITY TO PLACE ORDERS:

Carvel herewith authorizes the Supplier to accept orders placed by any of the Carvel Stores within the territory described above, provided that the total of such orders at any one time does not exceed $100.00 and the total of such orders within any month does not exceed $500.00. This authority may be revoked or modified by Carvel at any time.

13. INSURANCE:

The Supplier agrees to furnish Carvel with Public Liability Insurance with limits of $100/300,000 and $100,000 on property damage to cover any accident or accidents as may occur in delivery of merchandise and further agrees to furnish Products Liability Insurance with limits of $100/300,000 covering the merchandise manufactured for Carvel and delivered to the Carvel Stores. Copies of the policies shall be furnished to Carvel indicating Carvel and the Supplier as beneficiaries thereunder as their interest may appear.

14. TERM OF THIS AGREEMENT; PURCHASE OF SUPPLIES:

(a) The term of this agreement shall be one year from the date of the making hereof. Thereafter it shall automatically continue from year to year, unless either party shall give written notice to the other of intent to terminate, which notice shall be mailed not later than ninety (90) days before the expiration date of this agreement, or the applicable yearly renewal date.

(b) In the event that this agreement is terminated by Carvel in the manner aforesaid, Carvel agrees to purchase from the Supplier all packaged cones and supplies, imprinted with the Carvel name at the request of Carvel, then on hand including invoice-forms and packaging materials at the Supplier's cost as evidenced by invoices.

15. Notices:

All notices or other communications hereunder shall be addressed and sent as follows: To Carvel at the following address: 80 Woodworth Avenue, Yonkers, New York; To the Supplier at the following address: 805 East 140 Street, New York City, New York or to such other address as the parties may from time to time designate in writing.

16. Assignment:

This contract cannot be assigned by the Supplier, but may be assigned by Carvel to its successors and assigns.

17. Construction of Law, Etc.:

This agreement has been executed in the City of New York, New York. It shall be construed pursuant to the laws of the State of New York. It constitutes the entire agreement between the parties and cannot be changed or terminated orally.

In Witness Whereof, the parties hereto have caused these presents to be signed and their corporate seals to be hereunto affixed by their duly authorized officers the day and year first above written.

Carvel, Dari-Freeze Stores, Inc.

By Robert J. (Illegible) (Secty.)

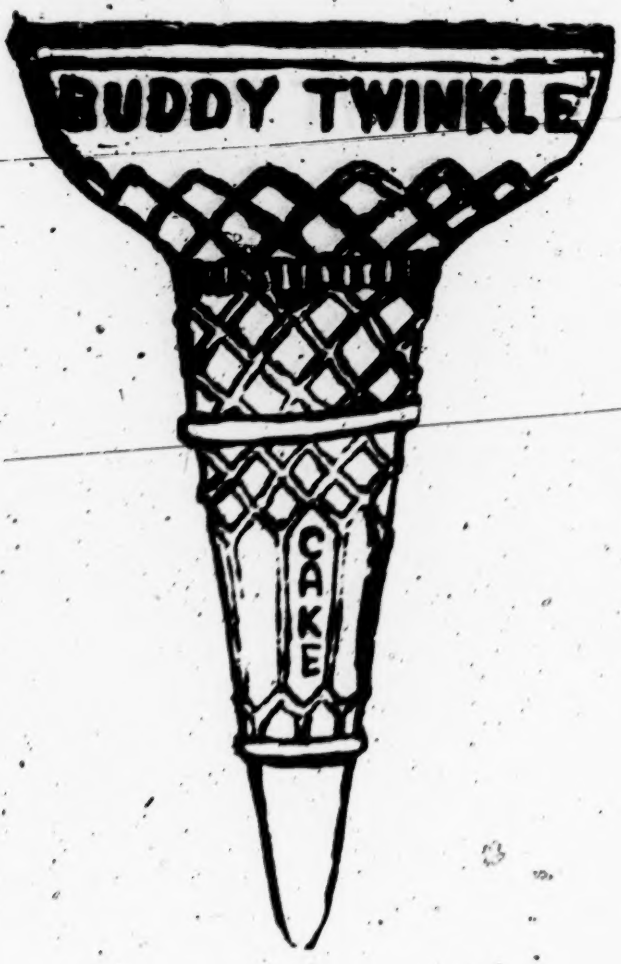
Eagle Cone Corporation

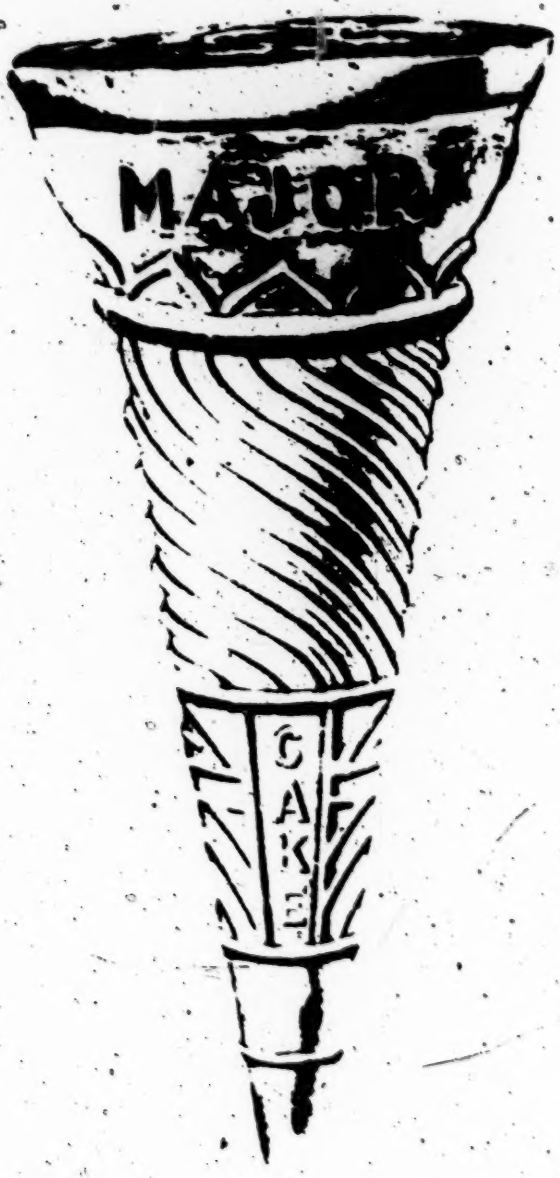
By Arthur X. Shapiro

Witness

(Illegible)

Martin Cain


BUDDY TWINKLE
CAKE


MAJOR
OAKES

[File endorsement omitted]

IN UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 28206

Civil File No. 150-212

BERNARD SUSSER, GERTRUDE SUSSER and SHIRLEY SCHWARTZ,
Plaintiffs-Appellants,

against

CARVEL CORPORATION, CARVEL DARI-FREEZE STORES, INC., CARVEL STORES REALTY CORPORATION, EAGLE CONE CORPORATION, H. P. HOOD & SONS, Defendants-Appellees.

Civil File No. 152-119

LESTER N. MODICK and HARRIET M. MODICK,
Plaintiffs-Appellants,

against

CARVEL STORES OF NEW YORK, INC., CARVEL CORPORATION, CARVEL DARI-FREEZE STORES, INC., EAGLE CONE CORPORATION, H. P. HOOD & SONS, Defendants-Appellees.

Civil File No. 152-120

MARTHA M. McCOY and FRANK T. McCOY,
Plaintiffs-Appellants,

against

CARVEL CORPORATION, CARVEL DARI-FREEZE STORES, INC., CARVEL STORES REALTY CORPORATION, EAGLE CONE CORPORATION, H. P. HOOD & SONS, Defendants-Appellees.

Civil File No. 153-193

JAMES OSSOLA and ELIZABETH G. OSSOLA,
Plaintiffs-Appellants,

against

CARVEL STORES OF NEW YORK, INC., CARVEL DARI-FREEZE STORES, INC., CARVEL STORES REALTY CORPORATION, EAGLE CONE CORPORATION, H. P. HOOD & SONS, Defendants-Appellees.

Civil File No. 153-194

JOSEPH P. PHELAN, Plaintiff-Appellant,

against

CARVEL STORES OF NEW YORK, INC., CARVEL DARI-FREEZE STORES, INC., CARVEL STORES REALTY CORPORATION, EAGLE CONE CORPORATION, H. P. HOOD & SONS, Defendants-Appellees.

Civil File No. 60 Civil 63

JAMES P. PIERCE, RITA PIERCE, LYLE FREDERICK, LEROY M. FREDERICK, ALFRED MUELLER and SOL RODENS, Plaintiffs-Appellants,

against

CARVEL STORES OF NEW YORK, INC., CARVEL DARI-FREEZE STORES, INC., CARVEL CORPORATION, CARVEL STORES OF PENNSYLVANIA, INC., CHAIN LOCATIONS OF AMERICA, INC., RAKESTRAW'S DAIRY PRODUCTS, INC., Defendants-Appellees.

Civil File No. 60 Civil 1096

MATTHEW SEU and JANE L. SEU, Plaintiffs-Appellants,

against

CARVEL CORPORATION, CARVEL STORES OF NEW YORK, INC., CARVEL DARI-FREEZE STORES, INC., CARVEL STORES REALTY CORPORATION, EAGLE CONE CORPORATION, H. P. HOOD & SONS, Defendants-Appellees.

Civil File No. 60 Civil 1990

PAUL S. GIBERMAN and GERTRUDE GIBERMAN, Plaintiffs-Appellants,

against

CARVEL STORES OF NEW YORK, INC., CARVEL DARI-FREEZE STORES, INC., CARVEHICLE CORP., CARVEL CORPORATION, CARVEL STORES OF PENNSYLVANIA, INC., CHAIN LOCATIONS OF AMERICA, INC., RAKESTRAW'S DAIRY PRODUCTS, INC., Defendants-Appellees.

Civil File No. 60 Civil 2042

JOSEPH PAZDRO and YOLANDA PAZDRO, Plaintiffs-Appellants,

against

CARVEL STORES OF NEW YORK, INC., CARVEL DARI-FREEZE STORES, INC., CARVEL CORPORATION, CARVEL STORES OF PENNSYLVANIA, INC., CHAIN LOCATIONS OF AMERICA, INC., RAKESTRAW'S DAIRY PRODUCTS, INC., Defendants-Appellees.

Carvel Defendants-Appellees' Appendix

IN UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

File No. 60 Civ. 2042

Plaintiffs request a trial by jury

JOSEPH PAZDRO and YOLANDA PAZDRO, Plaintiffs,

—against—

CARVEL STORES OF NEW YORK, INC., CARVEL DARI-FREEZE STORES, INC., CARVEL CORPORATION, CARVEL STORES OF PENNSYLVANIA, INC., CHAIN LOCATIONS OF AMERICA, INC., ILLINOIS BAKING CORPORATION, RAKESTRAW'S DAIRY PRODUCTS, INC., MOHAWK CONTAINER COMPANY, INC., BURRY BISCUIT CORPORATION, RICHARDSON CORPORATION, THOMAS CARVEL, FRED VETTEL, JR., GEORGE P. CLARK, ROBERT J. SHALLIS, AGNES CARVEL, DARROW NUTT, ANN M. MCHUGH, STANLEY W. TOWNSEND, BRUCE CARVEL, MILDRED ARCADIPANE, RICHARD A. CEROSKY, PHILIP AGREE and ARTHUR MARCIANTE, Defendants.

ANTITRUST ALLEGATIONS—EXCERPTS FROM PAZDRO COMPLAINT (SUBMITTED AS TYPICAL)

Plaintiffs, by Louis G. Greenfield, their attorney, for their complaint herein, upon information and belief allege:

1.

That heretofore and prior to the 3rd day of May, 1957, plaintiffs were engaged in doing business at certain premises described as Route #13 and Edgely Avenue, Bristol, Pennsylvania.

2.

That heretofore and prior to the 3rd of May, 1957, plaintiffs were engaged in doing business at certain premises

described as Route #13 and Edgely Avenue, Bristol, Pennsylvania.

3.

That heretofore and prior to and between and about the 3rd day of May, 1957, and the 10th day of June, 1958, plaintiffs were engaged in the retail business of selling and marketing a soft ice cream or frozen food product under and pursuant to a franchise agreement purchased and acquired by plaintiffs from the Carvel defendants, hereinafter more fully named and identified.

4.

That at all times hereinafter mentioned, defendant, Carvel Corporation, was and still is a corporation duly organized and existing under and by virtue of the laws of the State of New York, and maintained its principal office for doing business at No. 80 Woodworth Avenue, Yonkers, County of Westchester, State of New York.

5.

That at all times hereinafter mentioned, defendant, Carvel Stores of New York, Inc., was and still is a corporation duly organized and existing under and by virtue of the laws of the State of New York, and maintained its principal office for doing business at No. 80 Woodworth Avenue, Yonkers, County of Westchester, State of New York.

6.

That at all times hereinafter mentioned, defendant, Carvel Dari-Freeze Stores, Inc., was and still is a corporation duly organized and existing under and by virtue of the laws of the State of New York and maintained its principal office for doing business at No. 80 Woodworth Avenue, Yonkers, County of Westchester, State of New York.

7.

That at all times hereinafter mentioned, defendant, Chain Locations of America, Inc., was and still is a corporation

duly organized and existing under and by virtue of the laws of the State of New York, having its principal office for doing business at No. 80 Woodworth Avenue, Yonkers, County of Westchester, State of New York.

8.

That at all times hereinafter mentioned, defendant, Carvel Stores of Pennsylvania, Inc., was and still is a corporation duly organized and existing under the laws of the State of Pennsylvania, having its principal office for doing business at 80 Woodworth Avenue, Yonkers, County of Westchester, State of New York.

9.

That the defendants, Carvel Stores of New York, Inc., Carvel Dari-Freeze Stores, Inc., Carvel Corporation, Carvel Stores of Pennsylvania and Chain Locations of America, Inc. (sometimes hereinafter collectively referred to as "Carvel"), were and still are separate corporate entities purporting to act separate, independent and apart of and from each other.

10.

That at all times hereinafter mentioned, defendants, Carvel Corporation, Carvel Stores of New York, Inc., Carvel Dari-Freeze Stores, Inc., and Carvel Stores of Pennsylvania, Inc., were and still are engaged in the business of selling and distributing freezers and allied equipment and supplies to retail establishments selling ice cream and allied products under the name of "Carvel" or "Dari-Freeze" or both.

11.

That at all times hereinafter mentioned, defendant, Chain Locations of America, Inc., was and still is engaged in the business of securing and arranging for the acquisition of locations and sites for "operators" to operate and conduct retail stores under the name of "Carvel" or "Dari-Freeze" or both.

12.

That at all times hereinafter mentioned, the said Carvel defendants, acting separately or in conjunction with one another, were and still are engaged in the business of securing, acquiring and arranging for locations and sites for "operators" to operate and conduct the said Carvel Dari-Freeze Stores in accordance with the terms and conditions of a certain franchise agreement.

13.

That at all times hereinafter mentioned, the said Carvel defendants and, more particularly, defendant Chain Locations of America, Inc., were and still are purportedly engaged, either through employees or otherwise, in surveying and checking sites for the establishment of Carvel Dari-Freeze Stores for the purpose of determining the business or sales potential therein.

. . . . . .

26.

That at all times hereinafter mentioned, defendants, Thomas Carvel, Fred Vettel, Jr., George P. Clark, Robert J. Shallis, Agnes Carvel, Darrow Nutt, Ann M. McHugh, Stanley W. Townsend, Bruce Carvel, Mildred Arcadipane, Richard A. Cerosky, Philip Agree and Arthur Marciante, were and still are either officers, directors and employees of the corporate Carvel defendants named herein and were and are engaged in carrying out and executing the policies, plans, schemes and business of said corporate Carvel defendants.

. . . . . .

As and for a Third Separate and Distinct Cause of Action Against Defendants, Carvel Stores of New York, Inc., Carvel Dari-Freeze Stores, Inc., Carvel Corporation, Carvel Stores of Pennsylvania, Inc., Chain Locations of America, Inc., Illinois Baking Corporation, Rakestraw's Dairy Products, Inc., Mohawk Container Company, Inc., Burry Biscuit Corporation, Richardson Corporation, Thomas Carvel, Fred Vettel, Jr., George P.

Clark, Robert J. Shallis, Agnes Carvel, Darrow Nutt, Ann M. McHugh, Stanley W. Townsend, Bruce Carvel, Mildred Arcadipane, Richard A. Cerosky, Philip Agree and Arthur Marciante.

Title 15 §§1 & 2, U. S. C. A.

35.

Plaintiffs repeat, reiterate and reallege each and every allegation contained in paragraphs numbered "1" to "13" inclusive and "26" of the complaint herein with the same full force and effect as though herein fully set forth at length.

36.

That the corporate Carvel defendants and the individual defendants named in paragraph "26" of the complaint herein (all hereinafter referred to as Carvel defendants) acted in concert to carry out and execute the plans, policies and schemes of the corporate Carvel defendants and the acts and practices hereinafter set forth and alleged.

37.

That at all times hereinafter mentioned, defendant Mohawk Container Company, Inc. (hereinafter referred to as "Mohawk"), was and still is a corporation organized and existing under and by virtue of the laws of the State of New York, having its principal office for doing business at 59-05 60th Road, Maspeth 79, New York, and was and still is engaged in the business of distributing different and diverse types of containers and allied products used primarily in the retail sale of ice cream products.

38.

That in the course and conduct of its business aforesaid, defendant, Mohawk, manufactured, distributed and sold paper containers and allied products for the exclusive use of retail establishments operating under the name of "Carvel" or "Dari-Freeze" or both.

39.

That at all times hereinafter mentioned, defendant, Illinois Baking Corporation (hereinafter referred to as "Illinois") was and still is a corporation organized and existing under and by virtue of the laws of the State of Illinois, having its principal office for doing business at 2230 S. Union Avenue, Cook County, City of Chicago, State of Illinois, and was and still is engaged in the business of manufacturing and selling ice cream cake cones, cups and allied baked products.

40.

That in the course and conduct of its business, defendant Illinois manufactures, distributes and sells certain of its ice cream cake cones, cups and allied baked products for the exclusive use of retail esablishments operating under the name of "Carvel" or "Dari-Freeze" or both.

41.

That at all times hereinafter mentioned, defendant, Rakestraw's Dairy Products, Inc. (hereinafter referred to as "Rakestraw"), was and still is a corporation organized and existing under and by virtue of the laws of the State of Pennsylvania, having its principal office for doing business at Cumberland County, Mechanicsburg, Pennsylvania, and was and still is engaged in the processing, distribution and sale of dairy products.

42.

That in the course and conduct of its business, defendant Rakestraw processed, distributed and sold a certain type and kind of ice cream mix or formula for the exclusive sale to and use by retail ice cream establishments operating under the names of "Carvel" or "Dari-Freeze" or both.

43.

That at all times hereinafter mentioned, defendant, Burry Biscuit Corp. (hereinafter referred to as "Burry"), was

and still is a corporation organized and existing under and by virtue of the laws of the State of New Jersey, having its principal office at 1265 Durant, Elizabeth, New Jersey, and was and still is engaged in the manufacture and sale of cookies, cakes and biscuits.

44.

That in the course and conduct of its business, defendant Burry processed, distributed and sold certain types of cookies, cakes and biscuits for the exclusive sale to and use by retail ice cream establishments operating under the names of "Carvel" or "Dari-Freeze" or both.

45.

That at all times hereinafter mentioned, defendant, Richardson Corporation (hereinafter referred to as "Richardson"), was and still is a corporation organized and existing under and by virtue of the laws of the State of New York, having its principal office in the County of Monroe, City of Rochester, State of New York, and was and still is engaged in the manufacture and sale of soft drink syrups, dispensing devices and allied equipment and supplies.

46.

That in the course and conduct of its business, defendant Richardson manufactured, distributed and sold certain types or kinds of soft drink syrups and dispensing devices for the exclusive sale to and use by retail ice cream establishments operating under the names of "Carvel" or "Dari-Freeze" or both.

47.

That at all times hereinafter mentioned, the defendants herein were and still are engaged in commerce within the purview, scope and ambit of Title 15, Sections 1 and 2, U. S. C. A.

48.

That at all times hereinafter mentioned, said defendants enjoyed a large and substantial part and portion of the

general market in the sale and distribution of their respective products.

49.

That at all times hereinafter mentioned, there was and still is a vast market and demand, particularly within the said defendants' trading area, for the defendants' aforesaid ice cream and allied products.

50.

That during the period encompassed and contemplated by this complaint and prior and subsequent thereto, defendants entered into an understanding and agreement wherein and whereby:

(a) Defendants Mohawk, Illinois, Rakestraw, Burry and Richardson refused to sell their respective products to franchised dealers of Carvel defendants, including plaintiffs herein, at competitive or other prices;

(b) Franchised dealers of Carvel defendants, including plaintiffs herein, were required and compelled to purchase the products of defendants Mohawk, Illinois, Rakestraw, Burry and Richardson from and through the Carvel defendants and at prices and upon terms fixed by said defendants;

(c) The Carvel defendants designed the franchise, lease and other agreements so as to obligate and compel their franchised dealers, including plaintiffs herein, upon penalty of serious financial damage, to deal solely and only with defendants Mohawk, Illinois, Rakestraw, Burry and Richardson;

(d) Franchised dealers of Carvel defendants, including plaintiffs herein, could not and would not deal in competitive products;

(e) The Carvel defendants would terminate the franchise of any dealer or operator who failed to comply with the aforesaid agreements;

(f) The Carvel defendants would police their said franchised dealers to assure execution and compliance with the aforesaid agreements;

(g) Franchised dealers of Carvel defendants, including plaintiffs herein, were required to resell the defendants' said products at prices fixed and determined by defendants;

(h) Carvel defendants would institute legal action against their franchised operators who deal in competitive merchandise in order to enjoin such action;

(i) Carvel defendants would threaten competitive sources who sold to franchised dealers with legal action.

51.

That the franchise, lease and other agreements aforesaid were and are designed to secure and enforce faithful performance of the terms of the said agreements by plaintiffs and other Carvel operators, were and are the principal means and device whereby defendants implemented their said agreement and, through the use of force, duress and threats practiced on plaintiffs and others, carried out the terms of their aforesaid agreement.

52.

That for the purpose of carrying out the aforesaid unlawful combination, conspiracy, agreement and understanding, the defendants herein, by agreement and concert of action, have done the things which, as hereinabove alleged, they combined and conspired to do.

53.

That as a direct and proximate result and consequence of the acts, practices and conduct of the defendants as aforesaid, a large and substantial segment of the purchasing and consuming public, particularly in areas affected by the aforesaid agreement, was compelled to and did pay higher prices for the products manufactured and sold by the defendants herein, and the said public was deprived of the right

to purchase and obtain the said products in a free, open and competitive market.

54.

That as a direct and proximate result, cause and consequence of the conduct of the defendants as aforesaid, plaintiffs suffered extensive damages in the amount of approximately One Hundred Thousand ($100,000.00) Dollars.

55.

That pursuant to the provisions of the Anti-trust laws (Title 15, Section 15, U. S. C. A.), plaintiffs are entitled to recover threefold the damages sustained by them, together with reasonable attorney's fees.

56.

Jurisdiction of the Third Cause of Action is predicated upon the Antitrust laws of the United States.

As and for a Fourth Separate and Distinct Cause of Action Against Defendants, Carvel Stores of New York, Inc., Carvel Dari-Freeze Stores Inc., Carvel Corporation, Carvel Stores of Pennsylvania, Inc., Chain Locations of America, Inc., Illinois Baking Corporation, Rakestraw's Dairy Products, Inc., Mohawk Container Company, Inc., Burry Biscuit Corporation, Richardson Corporation, Thomas Carvel, Fred Vettel, Jr., George P. Clark, Robert J. Shallis, Agnes Carvel, Darrow Nutt, Ann M. McHugh, Stanley W. Townsend, Bruce Carvel, Mildred Arcadipane, Richard A. Cerosky, Philip Agree and Arthur Marciante.

TITLE 15 §§1, 2 & 14 U. S. C. A.

57.

Plaintiffs repeat, reiterate and reallege each and every allegation contained in paragraphs numbered "35" to "49" inclusive of the complaint herein with the same full force and effect as though herein fully set forth at length.

58.

That, the defendants, for the purpose of securing to themselves a monopoly in the products which they manufacture, distribute, handle, promote and sell, entered into, enforced, executed and implemented contracts and leases with plaintiffs herein and others and sold to them merchandise, supplies and equipment, on the express condition that the plaintiffs and others refrain from dealing in competitive products.

59.

That the conduct of the defendants aforesaid has had the tendency, capacity and effect of substantially lessening and foreclosing competition in the products aforesaid.

60.

Plaintiffs repeat, reiterate and reallege each and every allegation contained in paragraphs numbered "50" to "55" inclusive of the complaint herein with the same full force and effect as though herein fully set forth at length.

61.

Jurisdiction of the Fourth Cause of Action is predicated upon the Antitrust Laws of the United States.

WHEREFORE, plaintiffs respectfully demand judgment as follows:

C. On the Third Cause of Action, in the sum of $100,000 trebled, together with a reasonable attorney's fee;

D. On the Fourth Cause of Action, in the sum of $100,000 trebled, together with a reasonable attorney's fee;

E. That plaintiffs have such other and further relief as may appear to just and proper in the premises.

Louis G. Greenfield, Attorney for Plaintiffs, Office & P. O. Address, 350 Broadway, New York 13, N. Y.

Sidney W. Rothstein, Of Counsel, 350 Broadway, New York 13, N. Y.

"PRE-TRIAL ORDER NO. 5

* * * * * * *

ORDERED:

* * * * * * *

4. That plaintiffs agree that they are relying solely upon alleged *per se* violations of the antitrust laws and make no claim other than that their evidence will establish *per se* violations of the antitrust laws.

5. Plaintiffs' evidence at the trial on the issue of liability will be limited to (a) written agreements entered into between the Carvel defendants and the plaintiffs, and other documents supplementary thereto or explanatory thereof, (b) written agreements between the Carvel defendants and the supplier defendants, and other documents supplementary thereto and explanatory thereof, and (c) testimony heretofore taken of a Mr. Vettel and a Mr. Bittner.

* * * * * * *

All the parties to the actions at the aforesaid pre-trial conference consented to the provisions of this order.

Dated: New York, N. Y.,
February 7, 1962.

Archie O. Dawson, U.S.D.J."

—3170—

EXCERPTS FROM TRIAL TRANSCRIPT

The Court: * * * I imagine the defendant admits it is engaged in interstate commerce, doesn't it?

Mr. Weisman: This is one of the important parts of the

—3171—

* * * * * * *

case. We do not admit. We think there is lack of federal power and our brief will so demonstrate.

* * * * * * *

—3177—

. . . . . .

The Court: Well, I don't think the plaintiffs have to be engaged in interstate commerce.

Mr. Weisman: Yes, but the commodity which is a new product, an altogether new product, is not in interstate commerce.

STIPULATION

Mr. Klein: Will you stipulate that the product of the franchise dealer is absolutely a new product that is not delivered by Carvel?

Mr. Weisman: Yes.

Mr. Yarnell: Thank you.

Mr. Klein: All right, that is fine.

. . . . . .

—3199—

The Court: I understand, Mr. Yarnell, that you consider that there is a combination between the supplier defendants, do you?

Mr. Yarnell: You mean sort of a round robin with all of them participating?

The Court: Yes.

Mr. Yarnell: I don't believe that is our charge, your

—3200—

Honor.

The Court: No, I don't understand it is either. I understand you are charging that Carvel was violating the anti-trust laws by a series of agreements going out to each of the supplier defendants individually, isn't that right, Mr. Yarnell?

Mr. Yarnell: Yes, your Honor.

The Court: Well, I will take the Burry contract merely as possible proof against Carvel, not as against any other supplier defendant.

. . . . . .

—3259—

Mr. Yarnell: Your Honor, one of the elements in this action is the price at which operators may sell and advertise their products and that they must be uniform. One of the means that we contend was used by Carvel to insure uniformity of pricing is their cooperative advertising pro-

gram, where the operators were to use standard mats and standard forms of advertising and standard prices, and that the cooperative advertising credits were only given if the advertising was approved in advance by Carvel.

Mr. Weisman: How are you going to prove all that?

* * * * * * *

—3268—

The Court: * * * I take it that Carvel says in all these cases these were recommended prices.

Mr. Weisman: They do and we are going to show there were stickers with different prices and the guys got whatever sticker they wanted. If they wanted a 30-cent sticker, they got that; and if they wanted a 35-cent sticker, they got that. We have got them here in court.

* * * * * * *

—3285—

The Court: Do you want that in evidence? That is the one where the rats were running around the store, wasn't it?

* * * * * * *

—3286—

Mr. Yarnell: I'm not afraid of rats running around a store as long as they are—

The Court: I will receive it in evidence. It may be evidence for the defendant as to why they had to maintain this kind of supervision over their stores.

Mr. Yarnell: Yes, your Honor.

OFFERS IN EVIDENCE

(Plaintiffs' Exhibit 44 received in evidence.)

* * * * * * *

—3333—

The Court: * * * Can it be stipulated that the franchise operators were given training before they operated their stores and were required to take training?

Mr. Weisman: It was part of the regular procedure for establishing a store.

* * * * * * *

—3345—

The Court: What is next?

Mr. Yarnell: Here is one that I know has not been put in evidence yet, your Honor, because we had some discussion on it and I think—

The Court: What is it?

Mr. Yarnell: —it is relevant. It is the petition and the pleadings in the proceedings instituted in Hartford by Carvel against Mr. McCoy. The reason I think it is relevant, your Honor, is that it shows, for one thing, the price maintenance policy of the Carvel defendants—

The Court: Where does it show it?

Mr. Yarnell: —through the use of, you might say, either injunctive proceedings or other pressures to require the Carvel operators to use only the signs—

The Court: Stop your general talking. Where does it show it? If it shows it, that is one thing.

Mr. Yarnell: Item D under paragraph 9, your Honor, "Displaying Signs and other advertising material and products other than Carvel products."

* * * * * * *

—3346—

The Court: This is a petition to the Connecticut court for an injunction and you are relying upon what the petition says; is that it?

Mr. Yarnell: I'm offering it in evidence, your Honor, as proof of the fact that they are seeking to prevent dealers from selling at prices of their own choosing.

The Court: It doesn't say that in here. If that is the ground, I will reject it. It doesn't say that at all.

* * * * * * *

—3353—

Mr. Yarnell: A letter dated September 3, 1957, from

—3354—

Fred Vettel, Jr., addressed to "Dear Friend", which went out to all the operators.

The Court: All right, received in evidence.

I'm rather amused at this, because the last paragraph says, "Our supply department has blank signs to use should you care to increase or decrease your prices."

* * * * * * *

(Plaintiffs' Exhibit 46 for identification received in evidence.)

* * * * * * *

—3357—

Mr. Yarnell: The next, your Honor, is a letter dated April 26, 1957 from Franklin & Agree, the attorneys for Carvel, to Sol Rodens.

The Court: Let me see it.

This is a letter from the attorneys for Carvel to Mr. Rodens in which they call to his attention that he is selling an unauthorized item, to wit, an unauthorized quart container, whatever that is. They ask him to remove all unauthorized merchandise from the store and also say, "It has been further brought to our notice that you have expressed the intention of purchasing your paper goods elsewhere. This is perfectly proper, provided only that you conform with paragraph 9th of your franchise agreement, and attention is specifically brought to the following sentence of said paragraph: 'In the event that the dealer desires to purchase his printed paper goods from sources other than Carvel, Carvel shall license manufacturers of said products to print the Carvel name thereon in connection with the sales to the dealer, with products made in accordance with Carvel standards.'

—3358—

"We, therefore, bring to your attention that before any such paper goods are used, they must be submitted to Carvel for approval and in order to assure that all of the Carvel standards and requirements are met."

Received in evidence.

(Plaintiffs' Exhibit 52 received in evidence.)

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—3359—

Mr. Yarnell: The next item is a letter of April 11, 1957 from Franklin & Agree to Mr. and Mrs. Paul Giberman.

The Court: You are certainly putting in stuff for the defendants, aren't you?

Mr. Yarnell: It may be. We don't feel that it is. We feel that while at first blush some of these things look like they are helpful to the defendants, when your Honor has all of the documents together and sees the whole picture—

The Court: You have that inference from the franchise agreement. This letter, for example, says to this franchise holder:

—3360—

"We have been advised that you are using unauthorized and unapproved merchandise, to wit, pecans, walnuts, nutty mix and peanuts.

"Please be advised that it is imperative that you discontinue immediately selling all unauthorized merchandise if your very important rights under the franchise agreement are not to be impaired."

That is, as I understand it, the standard operating procedure when they sold unauthorized merchandise, they would be notified to stop. What interested me is the last paragraph here where the attorneys said:

"Let me add that these requirements of your franchise agreement are for the protection, not only of your own store, but of the entire Carvel operation and the standards upon which it is founded."

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—3472—

Mr. Roth: Your Honor, the second exhibit, we offer 32 patents, design patents and registered trademarks, which we utilized in the operation of the mix, the mix machine and the Carvel name, trademarks and registration of the Carvel name.

• • • • • • •

The Court: I am asking do you have any objection?

Mr. Yarnell: Your Honor, I am at a loss because I have not gone down to Washington to check individually.

The Court: All right, objection sustained. Mark them for identification.

(Defendants' Exhibit C-2 marked for identification.)

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—3480—

Mr. Roth: As our next exhibit, your Honor, we offer two receipts in connection with the SOP bearing Mr. Mueller's signature.

The Court: What is the relevance of that?

Mr. Roth: To indicate in March 31, 1954 he received

—3481—

his first SOP and a substitution was made as to that, as to a new SOP sometime in the latter part of 1955.

The Court: Any objection to that?

Mr. Rothstein: No objection.

The Court: All right, received in evidence.

(Defendants' Exhibit C-6 received in evidence.)

* * * * * * *

The Court: What is next?

Mr. Roth: There are three licenses, your Honor, for the manufacture of ice cream. As your Honor is aware, these plaintiffs operate in one of three states, Pennsylvania, Connecticut or Massachusetts. These licenses are licenses entered into by plaintiffs in each one of these states indicating the nature of the operation.

Mr. Rothstein: I don't have any objection. I don't see the relevance of these.

The Court: What is the relevancy?

Mr. Roth: The relevance, your Honor, is they indicate the type of operation conducted by the local dealer, that

—3482—

he is a manufacturer.

The Court: For this limited purpose we will receive them in evidence.

(Defendants' Exhibit C-7 received in evidence.)

* * * * * * *

Mr. Roth: Your Honor, as the next exhibit we offer a typical opening date brochure given away by Carvel Corporation.

The Court: How do you know that is what it is? You are offering a piece of paper.

Mr. Roth: It shows the name Joseph and Lillian Phelan on the paper.

The Court: See if there is any objection.

Mr. Rothstein: We have no objection to this.

The Court: Let me look at it. I can't see what is the relevance of this.

I can see certain relevance. No objection, we will receive it in evidence.

(Defendants' Exhibit C-8 received in evidence.)

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—3485—

Mr. Rothstein: If your Honor pleases, before the witness takes the stand, if counsel shows us that the photostatic copies of the trademarks and patents which have been offered are copies of authentic documents issued by the Patent Office, I will withdraw my objection.

The Court: All right, that is better.

Mr. Weisman: I so assure counsel. I checked them myself against the originals and returned the originals to the client.

The Court: All right, they can be received.

Mr. Rothstein: That is No. C-2.

The Court: C-2 is received.

(Defendants' Exhibit C-2 received in evidence.)

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—3489—

The Court: What is the purpose of this?

Mr. Weisman: If your Honor please, the dollar figures that were mentioned yesterday were responsive to a request from the Court for a concession as to the nature of

—3490—

the interstate commerce in which the Carvel defendants are engaged. This is for the purpose of showing the amount of business in that commerce done in the relevant market—I think you will remember the concession that the relevant market was five states—by all of the corporations for a period of time from 1953 to 1960.

The Court: It doesn't vary the concession made yesterday?

Mr. Weisman: No, no, no.

The Court: All right. Is there any objection?

Mr. Rothstein: No objection.

The Court: Received in evidence.

(Defendants' Exhibit C-9 received in evidence.)

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—3492—

The Court: What is next?

Mr. Weisman: If your Honor please, I would invite

—3493—

your Honor to take judicial notice of some data in the official publications of the United States Department of Agriculture, and specifically to certain tables appearing in those publications for each of the years 1953 through 1960. The material to which I specifically invite attention, so that the Court would not be burdened with a lot of other matter, although the book is there, appears for the year 1953 beginning at page 15, Table 9; likewise, Table 9 for 1954; Table 10 for 1955; Table 11 for 1956; page 10 for each of the years 1957, 1958 and 1959, being Tables 5, 4 and 4, respectively for each year.

The Court: What do these tables show?

Mr. Weisman: These tables will show the total gallonage production of frozen dairy products for each one of the five states mentioned: Connecticut, Massachusetts, Pennsylvania, New York and New Jersey, and when these figures in the official publication are placed in juxtaposition to the total amount of gallonage sold by all of the Carvel corporations in those states for the same period, the Court would have a basis for ascertaining, as we have done in the table, the percentage share of Carvel in that relevant market.

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—3499—

The Court: These seem to be official reports by the United States Department of Agriculture and Marketing Service, a government report.

Mr. Weisman: Under Rule 44 all you need for the doctrine of judicial notice is an official publication of a government agency and many times, as your Honor knows, the Court on its own initiative can take judicial notice of what appears.

The Court: I will receive these in evidence for what they are worth as being official government publications.

(Defendants' Exhibit C-10 received in evidence.)

The Court: If you want the table prepared on the basis—
Mr. Weisman: I have it all ready.

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—3500—

The Court: You are given that opportunity now to verify it. We will receive it in evidence subject to verification.

(Defendants' Exhibit C-11 received in evidence.)

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—3501—

Mr. Weisman: * * * If your Honor please, I have another schedule of the same figures but by state, which I think will reduce the burden of the Court.

The Court: Compiled from the same exhibit?

Mr. Weisman: Compiled from the same exhibit and subject to the same verification.

Mr. Rothstein: I make the same objection.

The Court: We will take it subject to verification.

(Defendants' Exhibit C-12 received in evidence.)

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—3503—

Fred Vettel, Jr., called as a witness on behalf of Carvel defendants, being first duly sworn, testified as follows:

Direct Examination.

By Mr. Weisman:

Q. Mr. Vettel, are you presently employed by the Carvel corporations?

A. Yes, I am.

Q. Any particular one?

A. I am employed by a variety of corporations.

Q. Will you please keep your voice up.

A. I am employed by a variety of the corporations.

Q. Which ones?

A. Carvel Dari-Freeze Stores; Carvel Stores of New York; Carvel Corporation; Carvel Stores of Pennsylvania and Carvel Stores of New Jersey.

Q. Are you an officer in each of these corporations?
A. I am.
Q. In what capacity are you employed?
A. I am the general manager of the Carvel organization.

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—3504—

Q. When did you become general manager?
A. In 1955 I believe.
Q. Just when, about?
A. In the early part of 1955; I think it was in either February or March.
Q. You have been in that position ever since?
A. Yes, I have.
Q. Prior to that had you been employed by the corporation?
A. Yes, I was.
Q. In what capacity?
A. I was a merchandising manager prior to that time.
Q. In the course of your duties and in the discharge of them, since the early months of 1955 as general manager, did you have in your charge the record-keeping system and the correspondence files relating to the operation of the business of these corporations?
A. Yes, I did.

Mr. Weissman: May I have the franchise agreement of the later period? It is your exhibit.
Mr. Yarnell: That is exhibit 1.

Q. I show you Plaintiffs' Exhibit 1 and ask you if you

—3505—

are familiar with this type of franchise agreement.
A. Yes, I am.
Q. Can you state when this form came into use? Not the precise date but about.
A. In the spring of 1955.
Q. Was the SOP to which reference is made in Plaintiffs' Exhibit 1 revised after 1955?
A. The original SOP was revised completely in 1955.
Q. Was it done under your supervision?
A. Yes, it was.
Q. I ask you to look at Plaintiffs' Exhibit 8-A, disregard all these reminder slips put in by counsel and just

tell me whether this is the book the preparation of which mostly on mimeographed sheets was in your charge?

A. Without looking through the entire book yes, it was.

Q. And you will note there are references on many pages but not all to the fact that there was a copyright?

A. Yes, I did.

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—3506—

Q. Did you know whether a copyright was issued?

A. Yes, it was.

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—3507—

Q. Is this the copyright of the book issued for the new SOP?

A. No. I believe that is a change.

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Q. There were just two. I show you both now having different numbers.

A. The number A190555 is the copyright on the entire book, yes, sir.

Q. And then thereafter copyrights were issued for various pages?

A. For changes made.

Mr. Weisman: I will just offer the first one, if your Honor please.

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The Court: It is received in evidence.

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Mr. Weisman: May I substitute a photostatic copy?

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OFFERS IN EVIDENCE

—3508—

(Defendants' Exhibit C-13 received in evidence.)

Q. Mr. Vettel, after the new form of franchise agreement was adopted and the SOP revised, what if anything was done so far as the Carvel operators who had signed previous forms of agreement were concerned?

A. We forwarded to each one of the stores a revised copy of the SOP and we picked up the old copy of the SOP.

Q. Are you familiar with the procedure by which that was done?

A. Yes, I am.

Q. Was it done under your direction?

A. Yes, it was.

Q. How was it done?

A. We had various personnel in the organization that visited each store and took the pages from the old SOP and replaced them with the pages of the new SOP.

Q. That began in the spring of 1955 and went on for some time?

A. Through the end of 1955 and I believe also there might have been a few in the early part of 1956.

—3509—

Q. Were these matters in your charge? Did you get reports about whether material was delivered to a particular store?

A. As the SOP was changed in each store I got reports on it.

Q. That means that you got a report that the pages were physically substituted or that a new book was delivered?

A. Yes, I did.

Q. Did there come a time in the early part of 1956 when you sent a letter to all Carvel dealers regarding the change in the SOP?

A. Yes, there did.

Q. I show you Defendants' Exhibit C-1B for identification and ask you if that is the letter to which you refer?

A. Yes, it is.

—3510—

Q. Did you prepare the letter?

A. Yes, I did.

Q. Did you sign the letter?

A. I did.

Q. What did you do about arranging for its mailing?

A. This letter was mailed to all of the stores that had the old type contract, before the yellow contract.

Q. How do you know that?

A. Because I directed my secretary to prepare the letter and it was on the instructions from me that the letter was mailed to all of the stores.

Q. And the mimeographing and the addressing was done on your premises?

A. Yes, it was. We have an addressing machine that automatically addresses a letter to each one of the stores involved.

Mr. Weisman: All right.

I now offer Defendants' Exhibit C-1B, marked for identification, in evidence.

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—3511—

By Mr. Rothstein:

—3512—

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Q. Did you see the enclosure of these letters in the ad-

—3513—

dressed envelopes?

A. Yes, this was done in my office.

Q. How many of such envelopes and letters were there?

A. I would only be able to give you an approximation, and I would think that it would be probably somewhere in the neighborhood of 300.

Q. And these were all stores that had franchises in existence prior to the revision of the franchise?

A. That is correct.

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—3514—

The Court: I will overrule the objection.

(Defendants' Exhibit C-1B for identification received in evidence.)

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—3515—

By Mr. Weisman:

Q. Now, Mr. Vettel, did you in the period prior to the use of Plaintiffs' Exhibit 1, the new franchise agreement, make available for purchase by the Carvel operators certain advertising posters?

A. Not prior to. Subsequent to.
Q. Subsequent thereto?
A. Yes.
Q. I show you a form of poster with a price printed on it and ask you if that is the type you used.
A. This type is used—was used before we made the change in the SOP, and some of this type, with additions, is still used now.

Mr. Weisman: All right.
May I have this marked?
The Court: Yes.
Mr. Weisman: I offer it in evidence.
The Court: Received.

(Defendants' Exhibit C-14 received in evidence.)

Q. Now, Exhibit C-14 refers to the price of a sundae as 30 cents.
A. That is correct.
Q. Did you have stickers with alternate prices printed?

—3516—

A. Yes, we did.

Q. I show you this part of a poster and ask you if this is the insert to which you have just referred.
A. Yes, it is.

Mr. Weisman: I should like to have that marked. I offer it in evidence.
The Court: Received in evidence.

(Defendants' Exhibit C-15 received in evidence.)

Q. After the SOP was changed, sir, were there any posters with blank places for prices?
A. Yes, there were.

Mr. Weisman: Do we have a sample of that?
Mr. Roth: Yes.

Q. Are these the type of posters to which you refer, with blanks?
A. Well, there are a variety of types, but this is typical of them.
Q. To each there is affixed, is there not, a little envelope with inserts of prices?

A. No. The store that orders the posters specifies the prices that they want and we send them the particular price

—3517—

that they desire.

Mr. Weisman: I offer this in evidence.

The Court: Received in evidence.

(Defendants' Exhibit C-16 received in evidence.)

Q. Was there another type which included a place for the operator to write his own price without any prearranged printed price?

A. Yes, sir.

Q. I hand you a poster and ask you if this is the type of poster which included provision to have the price written in or the printed price posted, as desired?

A. Yes, that would be a sample of another type.

Mr. Weisman: I offer this in evidence.

(Defendants' Exhibit C-17 received in evidence.)

Q. Do you know—when I say "know" I mean of your own knowledge—about letters which operators of Carvel stores sent to the company on the subject of their permission to use prices other than those recommended?

A. Yes, I do.

Q. Did you have occasion to take some of that correspondence from the files in the company?

A. Yes, I have.

Q. When was that done?

A. Within the last two months, I would say.

—3518—

Q. Did you do that in anybody's presence?

A. Yes.

Q. Whose presence?

A. Mr. Roth.

Q. Mr. Herbert Roth of our office?

A. That is correct.

Q. I now hand you a batch of letters and ask you if you can recognize whether these are the ones selected on that occasion in the presence of Mr. Roth.

A. Yes, they are.

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Mr. Weisman: • • •.

Q. I invite your attention to certain carbon copies of what purport to be letters and also to one original in handwriting and ask you, first as to the original, is this a letter that you received from the person who signed it, namely, James B. Pierce?

A. Yes, it is.

Q. Now, the other letters are carbon copies of originals

—3519—

that were mailed to the addressees indicated?

A. Yes, they were.

Q. How do you know that?

A. Our normal procedure is to put a copy of a letter that was sent to the store in the file.

Q. And you filed it in the regular files of the company where copies of correspondence are kept?

A. Yes, that is correct.

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—3521—

The Court: Let me ask you this, Mr. Vettel. Were these letters of which you have copies here written in the regular course of business?

The Witness: Yes, they were.

The Court: Who wrote them?

The Witness: I wrote some and some by our advertising manager, Mr. Dietze.

The Court: Did he write them under your supervision?

The Witness: Yes, sir.

The Court: Is it a regular part of the business of the Carvel organization to keep copies of such letters in this file?

The Witness: Yes.

The Court: Were those letters which you have here kept in the regular course of business?

The Witness: Yes, they are.

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—3522—

Mr. Weisman: I offer them as one exhibit.

(Defendants' Exhibit C-3 for identification received in evidence.)

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—3523—

By Mr. Weisman:

Q. On the same occasion were the other letters included in that batch which I now show you taken from the files, referring to correspondence in the regular course of business or copies of your letters sent in the regular course of business to various Carvel franchise holders?

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—3524—

The Court: I understand now. These are separate letters about equipment.

Were those letters sent by you or under your direction?

The Witness: Yes, they were.

The Court: Sent as a regular part of the business of the corporation?

The Witness: Yes.

The Court: And copies kept in the regular course of business?

The Witness: That is correct.

The Court: And those are part of the regular course of your business?

The Witness: Yes, sir.

Mr. Weisman: I offer them as one exhibit now marked C-5 for identification. In the righthand corner there is a pencilled identification of our list of exhibits.

—3525—

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The Court: I think, Mr. Rothstein, that these are merely offered as indicative of the business practices of the defendant and not as an indication of the particular plaintiff.

Mr. Weisman: And not proof of the fact of the transaction but only of the method of doing business.

The Court: For that limited purpose I am taking them, so they will be received in evidence.

(Defendants' Exhibit C-5 for identification received in evidence.)

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The Court: Received in evidence.

(Defendants' Exhibit C-18 received in evidence.)

Cross examination.

By Mr. Rothstein:

Q. Mr. Vettel, I am holding C-17 in my hand. Can you tell me when that was adopted by Carvel or first used?

A. You are referring to the particular form of this sign or the sign?

Q. That form of sign or that sign itself.

A. I couldn't tell you exactly, but it would be some time probably in 1957.

Q. I show you Exhibit C-16 and can you tell us when that particular type of sign was first used?

A. No, I would have to make the same guess. When we changed our policy the signs that we had in stock that had the prices printed on them, we bought overlays that could go over those prices. Then at a somewhat later date someone called to our attention that a store that wanted to change the prices was being penalized because they had to lick the sticker and put it on the sign, so from that point on whenever we had new signs we had eliminated the new prices completely, so there were a variety of dates.

—3529—

Q. What policy were you referring to which you said you made a change in policy?

A. The original policy was, prior to 1955, that the signs had printed prices on them and those were the only prices that were available.

Q. Was this the policy that was changed with respect to the furnishing of signs with printed prices?

A. The policy was changed and naturally with the change in policy we had to change the policy with regard to signs.

Q. What policy are you referring to that was changed other than the signs?

A. The change in the SOP that left the prerogative of prices up to the store owner.

Q. That was changed when?

A. In 1955.

Q. And that has continued down to the present day?

A. Yes, it has.

Q. And has a franchise owner since that change in 1955 always been free to set his own prices, is that right?

A. Yes, they have.

Q. That applies to all products dispensed at all these stores, ice cream products?

A. Yes, sir.

—3530—

Q. How about cones?

A. Yes, sir.

Q. He could fix his own price on cones?

A. They do, definitely.

Q. And isn't it a fact that a store owner must maintain a 10-cent and 20-cent price on cones?

A. No, it is not a fact.

Q. You do not require that?

A. No, sir.

Q. Have you ever required a store owner to maintain a 10-cent and a 20-cent price on cones after you changed your price policy?

A. Not that I recall, no, sir.

Q. Isn't it true that a store owner after the change in price policy in 1955 still had to obtain permission from Carvel to run a reduced-price sale?

A. No. We asked that they contact us if they were going to run a reduced-price sale so that we could advise the other store owners in the neighborhood and all participate in the same sale.

Q. But he didn't have to come to Carvel for permission?

A. No, sir.

—3531—

Q. At no time after the change in your policy in 1955 did he have to come to Carvel for permission to run a reduced-price sale?

A. No, sir.

Q. You testified in response to one of Mr. Weisman's questions with reference to identifying these letters that store owners had written to you for permission to change prices. Do you recall that?

A. That is correct.

Q. And you granted that permission, did you not?

A. Prior to 1955 and in one of the letters that you refer to it stands out quite vividly in my mind, a store owner even would write to us and we would grant permission. After 1955, and I believe one of the exhibits is the same store owner under the same circumstances, again requested permission and we told him that we had no control over it.

Q. In Exhibit C-5, which consists of a batch of letters which you previously identified, you have written store

owners generally concerning their installing certain types of equipment, is that right?

A. Yes, that is correct.

Q. And that was in line with your claimed right to approve specifications of new equipment, is that correct?

—3532—

A. Specifications of new equipment, yes.

Q. I take it that your approval for specifications of equipment was also a part of your change in policy in 1955?

A. Yes, it was.

Q. Just what change was that, what change in policy?

A. Prior to 1955 the purchase of equipment was made from one of the Carvel organizations. After 1955, under the changed franchise and changes made in the old franchises, the equipment could be bought at any location or from any distributor or manufacturer providing it met our specifications.

Q. Your specifications were equipment specifications contained in the SOP, were they not?

A. Yes, they were.

Q. And these are the specifications you are referring to when you say the store owner could buy equipment elsewhere provided it met your specifications?

A. That is correct.

Q. Carvel leases and does not sell the front-plate assembly to the store owner?

A. That is correct.

Q. That front-plate assembly is used on the freezer?

A. That is correct.

—3533—

Q. And the ice cream dispensed comes through that front-plate assembly, is that true?

A. Yes.

Q. That front-plate assembly is the thing which gives the swirl effect to the ice cream?

A. Yes, it does.

Q. Does Carvel have a patent on this assembly—has it not?

A. Yes, they do.

Q. Does Carvel license that patent to anyone, any other manufacturer of equipment?

A. I wouldn't know.

Q. Have you any knowledge of any other manufacturer

of equipment selling a freezer with that type of front-plate assembly?

A. Do you mean identical to the one we have on ours?

Q. Yes.

A. No, I do not.

Q. That type of assembly must be used with the Carvel equipment in the Carvel store, must it not?

A. Yes, it must—not in the Carvel equipment.

Q. I accept the amendment. With equipment in the

—3534—

Carvel store.

A. That is right.

• • • • • • •

—3535—

Q. You are correct. Carvel does have a patent on a refrigerated front display case, does it not?

A. I believe they do, yes.

Q. That refrigerated front display case is part of the equipment to be used in the Carvel store, is it not?

A. It may be, yes.

Q. Has Carvel to your knowledge licensed the use of that patent to any other manufacturer of this type of equipment?

A. I wouldn't know.

Q. In the batch of letters that are part of Exhibit C-5, Mr. Vettel, I direct your attention specifically to a letter dated November 2, 1961, bearing your signature, addressed to Messrs. Mucha & Huba. Will you look at that, please.

A. Yes, sir.

Q. That sets forth specifications for a low temperature cabinet?

A. No, it doesn't. It sets forth the approval for the low temperature cabinet.

Q. You approved one to this person?

A. Yes.

Q. Were the specifications mentioned in that particular letter?

A. Some of them were, yes, sir.

—3536—

Q. Those specifications were contained in the SOP under the equipment specifications?

A. I don't believe they were for this particular piece of equipment.

Q. Would you say that it was true with reference to other items of equipment which you authorized that the specifications were not contained in the SOP?

A. There were sometimes a variation, yes, sir. That is why we requested they write to us.

Q. For advance approval before they even purchased them, is that right?

A. That is right.

Q. After you made this revision in your policy in 1955 and about a year later, you sent out letters to storekeepers who had the early franchises?

A. I think it was a little less than a year but that is correct.

Q. You no longer considered those early franchises in effect, did you? And when I say you I mean Carvel.

A. We considered them in effect except that we didn't enforce those parts of the franchise described in the letter.

Q. Which related to prices?

—3537—

A. To the prices, the equipment, the paper goods.

Q. Carvel has a board of governors, does it not?

A. Yes.

Q. That consists of whom?

A. Various store owners.

Q. And who appoints them as members of the board of governors?

A. The various corporations involved.

Q. You mean the Carvel corporations?

A. That is correct.

Q. And they were also removable at the will of the Carvel corporations, are they not?

A. I really don't know. I believe they are appointed for one year.

Q. Is it not so that this board of governors meets and makes recommendations for price changes for all stores?

A. No, they make recommendations for the change in the recommended level of price changes.

Q. How about the standard level, Mr. Vettel?

A. We don't have any any more.

Q. You have no standard prices?

A. No, we have only recommended prices.

Q. And you never used the term standard prices with

—3538—

reference to resale prices of the product?

A. We did at one time but that has long since been changed.

Q. When was that used?

A. I couldn't say definitely.

Q. When was it changed?

A. I would say some four or five or six years ago.

* * * * * * *

The Court: Let me ask Mr. Vettel one additional question if somebody doesn't object to it.

You say you changed your policy around 1955?

The Witness: That is correct.

The Court: What caused you to change your policy or why did you change your policy?

The Witness: I believe that it was a combination of things. We had a group of store owners which filed a suit against us. Simultaneously with that suit we received notice of an investigation from the Federal Trade Commission.

The Court. Did you take any legal advice at that time?

The Witness: Yes, we retained the firm of Kaye, Scholer, Fierman & Hays and the revision of the contracts, the revision of the SOP and the various other documents that had been brought up here today, for instance the letter

—3539—

that went out to our stores, were all changed and sent out under the instruction of Professor Hand (sic, Handler) of that organization.

The Court: That is the professor of the anti-trust laws at Columbia?

The Witness: That is correct. He has a very good reputation.

The Court: Did you file these revised forms with the Federal Trade Commission?

The Witness: Yes.

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—3540—

Redirect examination.

By Mr. Weisman:

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Q. With regard to the board of governors, is that a corporate body?

A. No, sir.

Q. Is it a voluntary body?

A. No, sir—it is voluntary to the extent that we write to a particular store dealer and tell him that he has been appointed to the board of governors and if he accepts he accepts. If he doesn't, he doesn't, and we appoint someone in his place.

Q. Have you had any declinations?

A. Yes, I have.

The Court: It is a sort of advisory board?

The Witness: That is right.

Q. On a geographic basis, is that?

A. Each board of governors represents somewhere in the neighborhood of between 10 and 15 stores, depending upon the size of the area that those stores cover.

For instance, in Long Island where we have a high con-

—3541—

centration of stores they would have 15. Upstate they might represent eight. It is their responsibility to contact the other dealers for information, recommendations and bring them in where we can discuss them for the good of the whole chain.

Q. Including complaints?

A. Including complaints.

Q. And gripes, is that right?

A. It is amazing what they can come up with.

Q. Do you attend personally as general manager meetings of this group?

A. I usually conduct them.

Q. You are the chairman of the meeting?

A. Yes, I am.

Q. Are those all-day sessions?

A. They usually last about six and have lasted as many as ten hours.

Q. How frequently are they held?

A. About three times a year.

Q. Is that in addition to the convention?

A. In addition to the convention. We usually have a board of governors at the convention in addition to the three held in New York.

—3542—

Q. Are some of the subjects discussed matters like group insurance and other benefits to the individuals in the group?

A. It would be group insurance amongst them, that has been discussed; new items. For instance, a store develops a new item, that is brought in to us and we conduct experiments with them in the lab and when we have an item to present to them after we have experiment with it in some of the stores and we get their opinion of the item.

We also have them participate in recommendations for designs of the packages and signs and so forth.

—3543—

Q. And how about promotions, advertising?

A. They have on occasion recommended promotions and we have on occasion adopted some of their recommendations.

Q. And that included promotions for TV?

A. Radio, TV and newspapers.

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—3547—

Mr. Weisman: I think maybe they would consent to these things if I give the reference, rather than read it. The point is very clear. For example, let me make just one offer of proof. Rodens on page 170 to 180 gave smaller portions than recommended in the SOP, and on page 185 to 186 he changed prices to those recommended in the SOP in 1956. Things like that.

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—3548—

The Court: What is all this about, anyway? It isn't very important, is it?

Mr. Weisman: No. The import is that they did from time to time serve different portions—they admitted it—and charged prices other than the ones recommended.

The Court: You mean some of the plaintiffs?

Mr. Weisman: Yes.

The Court: Is there any doubt that the depositions so show? If there is, we can proceed with the reading of the depositions.

Mr. Rothstein: I honestly don't know what is in the

—3549—

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deposition.

Mr. Wilson: The first document the defendant Hood offers in evidence is a letter dated October 12, 1959, on Carvel stationery, addressed to "Dear Store Owner." We believe it to be a representative form of notice sent by Carvel or its subsidiary or affiliated companies to operators of Carvel stores, including the plaintiffs, concerning

—3550—

prices charged by Carvel for Carvel special formula ice cream mix. I understand that there will not be any question that this is a representative form of notice.

The Court: All right, received in evidence.

(Defendant's Exhibit H-1 received in evidence.)

Mr. Wilson: I next offer three papers, as follows, all on the stationery of Carvel Stores of New York, Inc.:

The first is dated October 8, 1957; the second, December 18, 1956; and the third, October 31, 1956. These are copies of letters which were sent to various of the plaintiffs in these actions, the first to Lester and Harriet Modick; the second to Mr. Matthew Seu, and the third to Mr. Joseph Phelan. They are notices in what we submit are representative form that these various plaintiffs have been placed on a COD basis, and I offer them in evidence and request the stipulation that these are representative.

Mr. Rothstein: We so stipulate, your Honor.

The Court: All right, received in evidence.

(Defendant's Exhibit H-2 received in evidence.)

Mr. Wilson: I would like to call the Court's attention to the fact that on the bottom of the first of these exhibits,

—3551—

dated October 8, 1957, is the notation, "Dairy to allow 2 per cent cash discount on mix and collect $2.50 per can royalty," and the procedure, I believe, and I don't think it will be controverted, was that Carvel would send a copy of this notice, which was sent to the various stores owners, and, in addition, containing a notation and a direction and instruction at the bottom of the letter. I understand that that is not controverted.

Mr. Weisman: The sentence wasn't clear, inadvertently. Do you mean that Carvel sent these notices to Hood as its agent to make these collections and/or to give these discounts in accordance with their instructions?

Mr. Wilson: They sent these notices to Hood under the terms of their arrangement and contract with Hood and those notations at the bottom constitute a direction and instruction to Hood.

Mr. Weisman: You had no right of veto or any discretion in the matter; you were simply the agent of Carvel?

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—3552—

Mr. Wilson: I next offer a letter on the stationery of Carvel dated March 27, 1957, addressed to Mr. and Mrs. Matthew Seu, which are, I believe to be, in representative form, notifying them that their account is taken off or removed from the COD basis. This is a copy of a letter which was sent by Carvel to Hood, and I understand it will be so stipulated as representative.

Mr. Rothstein: Yes.

The Court: Received in evidence.

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—3553—

(Defendant's Exhibit H-3 received in evidence.)

Mr. Wilson: I next offer in evidence what I believe will be stipulated to be a form of tag prescribed by Carvel to be attached to the cans of Carvel special formula mix delivered by H. P. Hood & Sons, Inc. for Carvel to the Carvel stores. I submit this as a representative sample and ask that it be so stipulated.

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The Court: Any objection, Mr. Rothstein?

Mr. Rothstein: No objection.

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Mr. Yarnell: That is for the mix, you Honor.

(Defendant's Exhibit H-4 received in evidence.)

Mr. Wilson: I next offer in evidence a form of Carvel invoice which was furnished by Carvel to be used by

H. P. Hood & Sons, Inc. in connection with its deliveries for Carvel of Carvel special formula mix to the plaintiffs and to other operators of Carvel stores. This form was

—3554—

used between May, 1953 and June, 1955, and I submit it was representative of the form used in that period and ask that plaintiffs so stipulate.

Mr. Rothstein: We so stipulate.

The Court: All right, received in evidence.

(Defendant's Exhibit H-5 received in evidence.)

Mr. Wilson: Similarly, I offer in evidence a second form of Carvel invoice including a form of delivery receipt which was furnished by Carvel to be used by H. P. Hood & Sons, Inc. in connection with its deliveries for Carvel of Carvel special formula mix to the plaintiffs and to other operators of Carvel stores, the form having been used in the period between June, 1955 and July, 1956. I submit that this is a representative form and ask that plaintiffs so stipulate.

* * * * * * * * *

The Court: We will receive it in evidence.

(Defendant's Exhibit H-6 received in evidence.)

Mr. Wilson: Then I offer in evidence, as one exhibit, other forms of Carvel invoices, including forms of delivery receipt which were furnished by Carvel to be used

—3555—

by Hood in connection with its deliveries for Carvel of Carvel special formula mix to the plaintiffs and to other operators of Carvel stores after July 11, 1956.

The Court: What relevance do all these have to the issues here, Mr. Wilson?

Mr. Wilson: Your Honor, I would like to show and carefully delineate the exact position of Hood in this total pattern of operation, and this shows that what we submit is the fact: That Carvel had a special agreement with Hood and that part of that arrangement was that Hood would function not only for the direct delivery of the mix, but also, for a consideration, would handle the matter of billing or invoicing and collection.

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—3556—

Mr. Weisman: I wonder if Mr. Wilson would care to correct his statement about shipments to the plaintiffs, because I understand they never made any shipments to any Carvel dealer that was in Pennsylvania.

Mr. Wilson: Not to the plaintiffs. I'm talking always here about the six groups of plaintiffs from the actions in which Hood is named as a defendant.

The Court: I understand.

(Defendant's Exhibit H-7 received in evidence.)

Mr. Wilson: Just for the purpose of record clarity, may I remind the Court that the contracts, the five contracts between Carvel and Hood, were marked as Plaintiffs' Exhibit 10 on the plaintiffs' case.

STIPULATIONS.

—3557—

Mr. Wilson: Your Honor, we have some stipulations which I think may make concrete some of the things in the record. I would like to read them in. I have been over them with plaintiffs' counsel.

The Court: Have they been agreed to by you, Mr. Yarnell, these stipulations?

Mr. Yarnell: We have agreed on quite a number of them.

The Court: Then those that are agreed upon may be read into the record.

Mr. Wilson: As to the Susser case, it is stipulated that the Sussers operated Carvel Store No. 247 on September 17, 1954 and have continued to operate it since that time; that Hood delivered Carvel mix to Carvel Store No. 247 for the first time on or about September 16, 1954.

As to the McCoy case, it is stipulated that Mr. and Mrs. McCoy opened Carvel Store No. 251 on June 28, 1955 and have continued to operate it since that time; also, that Hood delivered Carvel mix to Carvel Store No. 251 for the first time on June 24, 1955.

It is further stipulated as to the Ossola case that Mr. and Mrs. Ossola opened Carvel Store No. 326 on May

25, 1956 and continued to operate it until about Sep-

—3558—

tember 20, 1958. Their franchise agreement was terminated on September 20, 1958. It is further stipulated that Hood delivered Carvel mix to Carvel Store No. 326 for the first time on May 25, 1956. Hood made its last delivery of Carvel mix to that store on September 12, 1958.

As to the Phelan case, it is stipulated that Mr. Phelan opened Carvel Store No. 270 on June 11, 1956 and continued to operate it until about September 19, 1957; that Hood delivered Carvel mix to Carvel Store No. 270 for the first time on June 9, 1956 and that Hood made its last delivery of Carvel mix to that store on September 14, 1957.

As to the Seu case, it is stipulated that Mr. and Mrs. Seu opened Carvel Store No. 341 on July 4, 1956, and have continued to operate it since that time, and that Hood delivered Carvel mix to Carvel Store No. 341 for the first time on July 3, 1956.

As to the Modick case, it is stipulated that Mr. and Mrs. Modick opened Carvel Store No. 368 on June 11, 1957 and continued to operate it until November 11, 1959, and that they closed that Carvel store on November 11, 1959. It is further stipulated that Hood delivered Carvel mix to Carvel Store No. 368 for the first time on June 6, 1957 and that Hood made its last delivery of

—3559—

Carvel mix to that store on October 22, 1959.

It is also stipulated that Hood did not participate in any way in negotiations for or execution of any of the franchise agreements between the plaintiffs and Carvel or any of the other documents as may have been signed or exchanged by or between Carvel and any of the plaintiffs at the time of or in connection with execution of the respective franchise agreements.

It is also stipulated that the plaintiffs received from Carvel a copy of the Carvel Standard Operating Procedure Manual referred to as the SOP Manual; that with respect to Carvel ice cream mix delivered to the plaintiff store owners, first, the mix is flavored and other ingredients,

such as fruits, nuts, candies, cereals, etc., are added as needed; two, the mix is processed in a mix machine to obtain soft ice cream; three, to obtain hard ice cream, the soft ice cream is subsequently frozen in a separate freezer; and, four, that frequently the soft or hard ice cream so manufactured is shaped, decorated, garnished with syrups, fruits, nuts, marshmallow, and other toppings. and then packaged, as may be required, to make the various products described in the SOP Manual.

—3560—

The Court: That is done by the operators of the Carvel stores.

Mr. Wilson: Yes, your Honor, and the end product are those things with those glamorous names such as Lollapalooza and Mexican Sundae, and the others, the pictures of which have already been marked in evidence here today.

It is also stipulated that Carvel notified the operators of the Carvel stores of the prices the operators were to pay for Carvel mix, and it is also stipulated that the operators of Carvel stores operating in Connecticut and Massachusetts are required under the laws of the State of Connecticut and the Commonwealth of Massachusetts to obtain manufacturer's licenses.

Mr. Weisman: I have no objection to this stipulation except for the inference that by referring to Connecticut and Massachusetts that they need not have a similar license in Pennsylvania.

The Court: Well, this stipulation is as to the States of Connecticut and Massachusetts. . . .

. . . . . .

—3561—

Mr. Yarnell: I stipulated with Mr. Wilson as to all of those that have been read into the record.

The Court: Then it is stipulated.

Mr. Yarnell: Yes, of course. He wouldn't have read it into the record otherwise.

Mr. Weisman: May I on behalf of Carvel join in the stipulation.

The Court: Miss Preminger, do you want to say something?

Miss Preminger: Yes, your Honor. In several of the stipulations that Mr. Wilson read he referred to ice cream mix. May I have Mr. Yarnell's stipulation that it includes the mix furnished by Rakestraw? • • •

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—3562—

Miss Preminger: Yes. May I have it made clear that that also refers to Rakestraw?

Mr. Yarnell: We will be glad to give Rakestraw the same stipulation.

The Court: All right.

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—3566—

WALTER SIMONSEN, called as a witness on behalf of defendant H. P. Hood, being first duly sworn, testified as follows:

Direct examination.

By Mr. Wilson:

Q. Mr. Simonsen, are you employed by the H. P. Hood & Son?

A. Yes, I am.

Q. In what capacity?

A. I am sales manager for the ice cream mix sales division.

Q. How long have you held that position?

A. It will be seventeen years this July 3rd.

Q. Throughout the entire period of your employment H. P. Hood & Son have you held that position?

A. Yes, I have.

Q. How long in all have you been engaged in the ice cream business?

A. Since 1937; approximately 25 years.

Q. In your capacity as sales manager of the ice cream mix sales for Hood what are your duties briefly? Describe them for us.

A. My main duty functioning in the sales part of the business is to secure all the ice cream mix business that is available.

—3567—

I also act in a technical aspect in advising the plant in the manufacture of the ice cream mix.

Q. Other than yourself does anyone else on behalf of Hood supervise the business aspect and contacts with the Carvel account?

A. No.

Q. Were you in this position at the time the first contract between Hood and Carvel was entered into?

A. Yes, I was.

Q. Was that a contract which you played some part in negotiating?

A. Yes.

Q. Was that contract thereafter approved by the executive board of H. P. Hood & Sons?

A. Yes.

Q. With respect to the actual manufacture of the mix sold to Carvel who is the person or persons in charge of that actual manufacturing process?

A. The plant superintendent would be responsible.

Q. Where is this Carvel special mix manufactured?

A. At the Agawam plant.

Q. In connection with the preparation of this Carvel mix are there any periodic reports made by Hood to Carvel?

—3568—

A. There is a batch report made of each batch of Carvel special mix that is sent to Carvel.

Q. Will you tell us just a little bit more fully what you mean by a batch report.

A. The Carvel mix is made on a batch process. That means that you either make 250 gallons in a bath or make 500 gallons or 1000 gallons.

Now, all the specified dairy ingredients are added to the pasteurizer plus your sugar and stabilizer. This product is brought up to a pasteurizing temperature and held at that pasteurizing temperature, that is normally thirty minutes according to state regulations.

After it is pasteurized properly for the time set by the Board of Health, it is homogenized and then cooled and put into 10-gallon cans.

Q. Are these batches of Carvel mix made separate and distinct from all other types of ice cream mix made in the plant?

A. Yes, each batch of mix represents the type of mix that you are making. In the case of a Carvel mix, when you make a 250-gallon batch it is made according to the Carvel formula.

The Court: Do you make mixes for other companies?

—3569—

The Witness: Not Carvel mix. We make other mixes.

The Court: For other ice cream companies?

The Witness: Yes.

Q. For a number of other companies?

A. Yes.

The Court: They are different in formula?

The Court: And Carvel mix has a different formula?

The Witness: Yes

The Court: And Carvel mix has a different formula from other mixes that you make for other companies?

The Witness: That is right.

By Mr. Wilson:

Q. Was the formula for the Carvel mix supplied to Hood by Carvel?

A. Yes.

Q. And is that formula or recipe one which you employ only in making Carvel special mix?

A. That is right, yes.

Q. What is the purpose of sending these batch reports to Carvel?

A. We make a batch. On this batch report the ingredient is listed, the amount used and the final laboratory test of the product. It is Carvel's protection that we are comply-

—3570—

ing with their formula.

Q. What is the procedure and what has been the procedure and practice with respect to deliveries of Carvel mix over the years?

A. After the product is made it is delivered direct to the Carvel stands.

The Court: What is it when you deliver it, just so I can visualize it, is it an ice cream in a can or a liquid substance or what is it?

The Witness: Ice cream mix is a fluid product. It is canned and sealed, held under refrigeration and is very perishable like milk or cream. You can't warehouse it.

Your weather conditions are such that if it is a warm day they need the product. If it is a cold, rainy day they don't need too much. So in that vein of thought we make it and deliver it direct to the Carvel stands.

The Court: It doesn't become an ice cream until it goes through the freezer?

The Witness: Until they manufacture it into ice cream.

By Mr. Wilson:

Q. Is this ice cream mix in the form in which it is shipped

—3571—

out of the Hood plant and delivered a highly-perishable product?

A. Yes.

Q. Will you tell us the purpose behind the practice of direct deliveries of this Carvel mix which is being delivered to the store operators.

A. You have to deliver direct to the stand. Not only are his orders based on weather conditions and when he needs it, we would have no time to deliver to an intermediate warehouse—you couldn't because it has to be refrigerated. It is refrigerated on the truck as it is being delivered to the stands. Being perishable you have to do that.

Q. In your opinion would delays in transportation and delivery to the Carvel store operators result in impairment of the quality, taste and healthfulness of the mix?

A. Yes.

Q. I show you this tag and this seal which has been marked Hood Exhibit 4 and ask you if that seal and this

tag is a representative seal and tag which is affixed to the cans containing the ice cream mix?

A. Yes, it is.

Q. This ice cream mix is shipped out, is it not, from the

—3572—

Hood plant in large 10-gallon cans?

A. That is right.

Q. That is a uniform practice, in 10-gallon cans?

A. Well, for Carvel it is.

Q. For Carvel it is?

A. Yes.

Q. Has been so over the years involved here in these actions, is that right?

A. That is right.

Q. Did Hood participate through any of its representatives in any way with the negotiations or in the preparation or execution of franchise agreements with the six groups of plaintiffs here with which we are involved?

A. No.

Q. Did Hood participate in any way in connection with the negotiations for, the preparation or the execution of any of the other documents which were executed between the plaintiffs here and Carvel in connection with the franchise agreements?

A. No.

Q. Did Hood or you have any knowledge of any of the franchise agreements between Carvel and the operators of Carvel Stores?

A. No.

—3573—

Q. Or any of the provisions contained in them prior to the commencement of these very actions?

A. No.

Q. Did you or Hood have any knowledge of any of the documents that were negotiated and signed and executed between Carvel and the operators of the Carvel stores in connection with the operation or with the execution of the franchise agreements prior to the commencement of these actions?

A. No.

Q. Did Hood participate in any way either in the preparation or in the distribution of the Carvel SOP manual or of any supplements or additions to that manual at any time?

A. No.

Q. Did Hood have any knowledge of the Carvel SOP manual or of any additions or supplements to that manual or of any of the provisions contained in the manual prior to the commencement of these actions?

A. No.

Q. Did you or any of Hood's officers or employees to your knowledge give any instructions to any of the plaintiffs relating to the operation or the method of operation

—3574—

of the Carvel stores?

* * * * * * *

The Court: As far as the witness knows.

Q. As far as you know.

A. No.

Q. Does Hood or anyone representing Hood determine or participate in determining the prices which the operators of the Carvel stores had to pay to Carvel for the Carvel mix?

A. No.

Q. Does Hood or any representative of Hood determine or participate in determining any changes in prices from time to time of the Carvel mix which is sold by Hood to Carvel?

A. No.

Mr. Wilson: I should have said in the last question—may I have that question read?

(Question read.)

Mr. Wilson: I should have said sold by Carvel to the Carvel stores.

Q. Did you get that clearly? Does it determine or participate in that?

A. No, it doesn't.

—3575—

Q. Is Hood notified in the usual course about prices and price changes of the Carvel mix to the store operators?

A. No.

Q. Charged by Carvel to the store operators.

A. No. We get a letter what the price will be, the delivered price to the store.

Q. Who sends that letter to you?

A. Carvel.

Q. Is that one or are those letters so marked in evidence here representative of the kind of notification that Hood gets?

A. Yes.

Q. Does Hood determine or participate in determining the condition under which Carvel will grant to the operators of the Carvel stores any discount on purchases of Carvel mix?

A. No.

Q. Does Hood have anything to do with fixing or determining the amount of such discount?

A. No.

Q. Does Hood determine or participate in determining in any way when a store is to be placed on a C.O.D. basis

—3576—

in connection with the purchases of Carvel mix from Carvel?

A. No.

Q. Is Hood in the usual course and practice of the business notified of the fact that a particular Carvel store operator is placed on a C.O.D. basis.

A. Yes.

Q. How do it receive that notification?

A. We get a copy of the letter that is sent to the particular customer wherever these conditions are to exist.

Q. By whom is such letter sent to the particular customer?

A. By Carvel.

Q. And Hood gets a copy of that in the usual course?

A. That is right.

Q. I show you this exhibit which has been marked Hood Exhibit 2 consisting of three letters and ask you if those are illustrative of the kind of notification that Hood gets from Carvel?

A. Yes.

Q. I notice on the first of those letters, the one dated October 8, 1957, addressed to Lester and Harriet Modick,

—3577—

there is a pen-and-ink notation at the bottom headed "Dairy". Do you see that?

A. Yes.

Q. Will you explain to us the significance of that notation?

A. The policy that we have is that when we get a notice like this that we are collecting the money for Carvel, we allow the two per cent discount when the bill is made out to the customer and collect the $2.50 per can royalty. When we make out the delivery slip we always add the $2.50 per can royalty and the customer signs the delivery slip and we collect the moneys.

The Court: The royalty goes to Carvel, I take it?

The Witness: Yes.

Q. To whom does this royalty to which you refer go ultimately?

A. That goes to Carvel.

Q. I think you have already told us that the two per cent discount is arranged for, determined by Carvel and not by Hood, is that right?

A. That is right.

Q. Is this notation to which you have just referred and similar notations, the form in which the instruction comes

—3578—

from Carvel to Hood with respect to the discount and with respect to the collection of royalties?

A. On the Carvel letter.

Q. When a Carvel store operator is removed from this C.O.D. basis is Hood advised of that fact?

A. Yes.

Q. From whom does the advice come?

A. From Carvel.

Q. And in what form or manner is that advice conveyed to Hood?

A. On a similar letter basis.

Q. I show you this letter which has been marked Hood Exhibit 3, a letter dated March 27, 1957, addressed to Mr. and Mrs. Matthew Seu and ask you if that is representative of the letter advising of the removal of the Seus from the C.O.D. basis?

A. Yes.

Q. Is that illustrative of the usual practice by which this matter was handled over the years?

A. That is the procedure.

Q. Does Hood determine or did it determine over the years or participate in determining the form of the Carvel invoices to be presented to the operators of the Carvel stores with each delivery of the ice cream mix?

—3579—

A. The answer is No.

Q. Who did work out and prepare the form of those invoices?

A. Carvel has furnished us with those delivery invoices.

Q. We have placed in evidence here this afternoon and you have seen the various forms of invoice that have been marked here as Plaintiffs' Exhibits 5, 6 and 7, is that correct?

A. Yes.

Q. You have seen them?

A. I have.

Q. In connection with the delivery by Hood to the Carvel store owners of the special Carvel ice cream mix, what was the procedure and practice with respect to handling of these invoices which were presented upon the delivery of these 10-gallon cans of mix?

A. When we received an order from a particular store notifying us how much mix they wanted on the next delivery, it is the usual procedure that the billing is made out for the amount of mix with the owner's name and where the mix is to go.

—3580—

If there are discounts on there for royalty collections—that would be it, and the price of the mix. That slip goes with the delivery of the mix. The owner acknowledges that slip and signs his name to it.

—3581—

Q. He acknowledges the receipt of the ice cream mix?

A. That is right.

Q. And then does the driver for Hood collect sums in payment of these invoices?

A. Yes.

Q. And in certain cases where it is appropriate according to Carvel instructions there is a discount allowed?

A. That is right.

Q. And what then becomes of the sums that are collected on these Carvel invoices from the Carvel store operators?

A. Well, the money or the checks are brought back to the branch and they are deposited in Carvel's bank account.

Q. What becomes of the original invoices in the usual course of practice upon delivery of the merchandise to the Carvel store operator?

A. The original one is left in the stand, in the Carvel stand. A copy goes to the branch, a copy goes to Carvel, a copy comes to the main office.

Q. Do the retail ice cream stores, so far as you know, sell ice cream mix directly to the public?

A. No, they don't.

—3582—

Q. Is that ice cream mix which comes to them in these ten-gallon cans processed by the Carvel store operators at the store?

A. Yes, he is the manufacturer. The mix is a basic component of ice cream, but it is in the liquid form.

The Court: Let me ask you one question, just to display my ignorance. I have never been able to embark on the finer things of life, so I have never had Carvel ice cream. I can't afford it, I don't think.

Does it come in different flavors?

The Witness: I will see if I can give you somewhat of a complete job on this. The ice cream mix is delivered to the

store in a liquid form. It has the proper butter fat, sugar content, milk solids, and stabilizer in the mix. The operator takes this mix, puts it in the Carvel ice cream machine. He takes it from a temperature of about 40 or 45 degrees, storage degrees, 35 or better, puts it into the machine. I don't know the temperature that he draws it out at, but I do know that it changes it from a liquid to a semi-solid product, so that it will stand on top of an ice cream cone. You can put it in a sundae dish. You can put it in a banana split dish. You can put it in a pint package.

—3583—

The Court: That is done by the operator and not by you?

The Witness: That is right. Our duty ends when we deliver it in good condition.

The Court: How does he get different flavors out of it?

The Witness: He adds a vanilla flavor, chocolate flavor, strawberry flavor.

The Court: You don't make the different flavors?

The Witness: No.

The Court: This is known as a soft ice cream product?

The Witness: Yes.

The Court: Do you manufacture mix for other ice creams that are not soft ice creams?

The Witness: Oh, yes.

The Court: Does it have to be a special kind of mix for a soft ice cream?

The Witness: Well, some of the Carvel mix is made into a hard form, too. If you subject a package of it or a sundae to below 10 degrees temperature or some facsimile of that, low temperature, you change that from the soft ice cream to a hard ice cream and it can be taken out in pint form or

—3584—

whatever form you wish, including, I believe, novelties they have.

The Court: But you say this is a different formula from the other formulas that you use for other customers who buy the mix from you?

The Witness: This is, as we have said, a special formula that—

The Court: That Carvel gave to you?

The Witness: They gave us.

The Court: It is a secret formula?

The Witness: It is a secret formula according to the contract that we have with them. It is something that they have devised and that works the best, I will assume, in their machine.

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—3585—

Q. Does Hood and has Hood over the years kept this particular special recipe of Carvel confidential?

A. Yes.

Q. Does Carvel insist that it do so?

A. Yes, they do.

Q. And has it throughout the years, from the beginning of the relationship?

A. Yes.

Q. Now, this ice cream mix is soft. Will you just tell us in your own way, from your rather abundant experience in the ice cream business, what is done with it in the production of these various frozen dairy products which are ultimately sold to the public; will you tell us that? How is it flavored and topped and whatever else is done with it?

A. In the soft form it is flavored, in the basic form.

Q. Where is that done?

A. At the stand.

Q. It isn't done at the Hood plant?

A. No.

Q. Please take it from there.

A. The customer receives the mix and he adds whatever flavor he wants to it, vanilla, chocolate, strawberry, coffee,

—3586—

and he puts it in the Carvel ice cream freezer and freezes it to the point that it is a semi-solid product, changing it from a liquid, and in this form it is what we call in the industry soft served.

Q. Soft served?

A. This is soft-served ice cream.

Q. Right.

A. Now, with that he can serve a soft-served sundae. He can serve a soft-served banana split, or he can use it in frappes or shakes. If he wants to put it in pints or quarts for carry-out later on, he can subject to it a low temperature, below, say, 5 or 10 degrees below zero, and this changes it from a semi or soft-served product to a hard ice cream product.

Q. And then what are the various processes to which either soft or hard ice cream may be further subjected and customarily are at these Carvel stands and in other retail stores?

A. Well, your soft-served sundaes—I mean, he takes a basic ingredient or he adds or garnishes it with strawberries, pineapples, fruit salad.

Q. Marshmallow?

A. Marshmallow.

Q. Syrup?

A. Nuts, syrup.

—3587—

Q. Cereals?

A. Yes.

Q. Grapenuts?

A. Yes.

Mr. Wilson: That one perplexed me, your Honor, until I finally heard of grapenuts. I was thinking of oatmeal in the first instance and I had never heard of that before.

Mr. Weisman: You left out cherries. I happen to like cherries.

The Witness: Garnished with a cherry.

Q. And those things, are they called toppings in the business?

A. Yes.

Q. And the end result, I take it, are some of these frozen dairy products such as we have seen illustrated in the ads here today; for example, I made a note of one called Mexican Sundae, filled with crunchy Spanish peanuts, with delicious chocolate syrup; is that the end product? Would that be illustrative of one of these procedures?

A. Yes.

Q. And also in using this component of ice cream mix
—3588—
you can produce what is finally sold as a Lollapalooza or Papapalooza; is that right?

A. Yes, that would be a form.

Q. And so on down the picturesque list?

A. Yes.

Q. Has Hood ever determined or participated in determining the prices charged to the public by the Carvel store operators for the frozen dairy products sold at the Carvel stores to the public?

A. No.

* * * * * * *

Cross examination.

By Mr. Rothstein:

Q. Mr. Simonsen, I take it that any ice cream mix your company prepares must be made in accordance with regulations in the state in which it is being sold?

A. That is true.

Q. The State of Connecticut has its own regulations relating to ice cream mix?

A. Yes.

Q. And the State of Massachusetts as well?

A. That is right.

—3589—

Q. And you sell in both states, do you not?

A. Yes.

Q. And regardless of what formula you may use in the preparation of your batches, your batches still must comply with the state regulations; is that not so?

A. Yes, they are the basic regulations.

* * * * * * *

—3590—

Q. Wasn't there a time between the period 1957 and 1959 when Hood was delivering Hood mix and not Carvel special formula mix to Carvel stores in Connecticut?

A. No.

Q. This never happened?

A. That is right.

Q. Did Hood at any time ever deliver anything but Carvel special formula mix to any Carvel stores in Connecticut?

A. No.

Q. This never happened?

A. That is right.

Q. Did Hood at any time ever deliver anything but Carvel special formula mix to any Carvel stores in Connecticut?

A. No.

Q. Or Massachusetts?

A. No.

Q. I take it you are familiar with the Carvel special formula for its mix?

A. Yes.

Q. You are one of the persons to whom this secret has been entrusted?

A. Yes.

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—3591—

Q. Emulsifier?

A. We purchase from Carvel a special stabilizer. Now, whether that has an emulsifier in it—we don't know the basic ingredients of that stabilizer, so I can't answer that unless I know the formula of the stabilizer that we purchase.

—3592—

Q. That you purchase from Carvel?

A. This special stabilizer, yes.

Q. Is it not a fact that it is only in respect to this particular item that the Carvel special formula differs from other formulas for mix?

A. No.

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—3597—

Q. Do you know whether the Carvel stands or stores to which Hood makes deliveries are owned by Carvel or are not owned by Carvel?

A. I don't know.

Q. Had you ever discussed with Mr. Vettel, Mr. Greene

or anyone in Carvel whether these stores to which Hood makes deliveries were owned by Carvel or not by Carvel?

A. No.

* * * * * * *

—3600—

Q. At that time, when you found out about Carvel, did you find out that the Carvel stores were independently owned?

A. No.

Q. And at no time during any of your subsequent contract negotiations with Mr. Vettel or anyone else connected with Carvel did you have any discussion concerning the ownership of any of these Carvel stores?

A. No.

* * * * * * *

—3601—

Cross examination.

By Mr. Weisman:

Q. Mr. Simonsen, in this contract in 1956, which is in evidence, there is a provision in paragraph 3A which reads:

> "Only Carvel stabilizer and Carvel emulsifier shall be used, which Carvel agrees to supply to the processer at such prices as shall, from time to time, be in effect."

Do you remember that clause?

A. I remember it.

Q. Is that what you were referring to in your testimony?

A. Yes.

Q. Now, in the ice cream mix that you make for yourselves, Hood, I assume you use a stabilizer and an emulsifier?

A. Yes.

Q. In the ice cream mix that you make for other people other than Carvel, do you use a stabilizer and an emulsifier?

—3602—

A. Yes.

Q. In those contracts with others, do you have any other instance where that customer supplies the stabilizer and the emulsifier?

A. No.

Q. Is Carvel the only one?

A. Yes.

Q. And actually are these two substances in your own, Hood, process, a stabilizer and an emulsifier?

A. In our own—

Q. In your own, the Hood mix.

A. The Hood mix?

Q. Yes.

A. We have other stabilizers, not the Carvel stabilizer and emulsifier.

Q. They are two different substances, a stabilizer and an emulsifier?

A. Yes, they are.

Q. When you get the stabilizer and emulsifier from Carvel, is that one substance?

A. I believe it is.

Q. Has this practice to which I referred in the provision

—3603—

of the contract been carried out: that is, have you been working under this provision of the contract?

A. Oh, yes.

* * * * * * *

—3608—

FRED VETTEL, JR., recalled, having been previously sworn, testified further as follows:

Direct examination.

By Mr. Weisman:

* * * * * * *

—3609—

Q. Now, with relation to the flavorings, that is, the things that go into the mix when it is manufactured at the retail establishment into the final product, does Carvel make any of these flavorings by secret formula or special formula, or is that just purchasable on the market?

A. No, sir, they are made by special formula.

Q. What does this refer to; I mean, the class of flavorings that you make by special formula?

A. That would refer to the purees and some of the extracts and the cocoa powder.

Q. By purees you are referring to fruit purees?

A. That is correct.

Q. Such as what—strawberry?

A. Strawberry, black raspberry, cherry, pineapple, peach.

Q. Banana?

A. Banana, orange-pineapple, pistachio-pineapple.

—3610—

Q. Do you have these fruit purees made to your specifications by processers of these products?

A. Yes, we do.

Q. Do you arrange as part of the transaction to purchase certain of the fruits at crop site; that is to say, at auctions similar to the way tobacco is sold?

A. That is part of our specifications, yes, sir.

Q. What qualities, if any, as a result of your formulas for these purees does the flavoring possess that is useful or necessary to the retail operator in making this product?

A. Well, in the case of the fruit purees it would have to do with the solid content of the puree. In the case of the cocoa powder it would have to do with the fat content as well as the solid content.

Q. When you say "have to do," what is the relationship between the solid content in the puree and in the cocoa powder and the processing of the mix in the Carvel freezing machine?

A. Well, when the flavor is incorporated into the mix, unless we maintain a balance of solids and fats that is favorable to the equipment through which it is going to be processed, you may deteriorate the product that eventually is

—3611—

given to the customer, and by having the specifications that we do that make the flavor compatible to the mix, it produces the product that we are after, that is eventually sold to the customer.

—3612—

Q. There is also a relationship of this compatible arrangement of ingredients with the temperature at which this is made into a finished product by means of the Carvel freezer?

A. There is a relationship of the flavored mix that goes through the freezer to the speed at which it is churned in the freezer as well as to the temperature at which it is churned, yes.

Q. Is there anything else that is of consequence with relation to the cocoa powder?

A. In regard to the cocoa powder, as I said before, you have a question of both solids and fat as well as the process under which the powder itself is made before it is incorporated in the flavoring compound.

Q. Does this quality control that you speak of have any relationship to the taste of the Carvel finished products?

A. Very definitely. If we didn't specify the process we could wind up with a very alkaline cocoa. We could also wind up with a very heavy grind cocoa. We specify both the grind and the process under which the cocoa is prepared from the bean.

Q. Do your specifications of these flavorings have any-

—3613—

things to do with the wholesomeness of the finished product that comes out of the machine for consumption by the buyers?

A. Yes, they do, because we specify the temperatures and the rate of pasteurization in all cases of the purees. We specify the process under which the components are put together in the case of the cocoa powder.

Q. After the flavored product comes out of the freezer and is made into this soft ice cream by the retail operator, it can be sold as such or it can be garnished with additional toppings, is that right?

A. That is correct.

Q. As I understand it you consider the topping part of the finished product?

A. Quite definitely.

Q. Do you specify by any special Carvel formula what is to go into the topping as distinguished from the flavorings?

A. By formula in some cases and by specifications in others.

Q. In the case of toppings or garnishment what do they have to do with the matter of taste or wholesomeness, if

—3614—

anything?

A. As result of the specifications or the formula we have obtained products that are compatible to the ice cream and we also insure the quality of the products that eventually garnish or top the ice cream.

Q. With regard to the formula mix itself as made by the dairies, Rakestraw and Hood are not the only dairies that you deal with?

A. That is correct.

Q. Is the formula you give to the dairies the same?

A. Yes, it is.

Q. You never disclose to anybody, do you, the flavorings or the other ingredients, the stabilizers and the emulsifiers, is it?

A. The stabilizer and emulsifiers are not disclosed to the dairies.

Q. You furnish those directly as Carvel to the dairies to use in making up the mix pursuant to the Carvel special formula?

A. That is correct. We furnish them as a finished product.

Q. Are those made for you by outfits other than the dairies concerned?

A. Yes, they are.

—3615—

Q. To those outfits you disclose the formula for those ingredients?

A. That is correct.

Q. Are these the same emulsifiers and stabilizers that you furnish to the other dairies in addition to Hood?

A. Yes, it is.

Q. Do you do anything to supervise the dairies in the observance of your formula, to check on them?

A. Yes, we do. We receive a batch report from the dairy at the time that each batch is made which discloses to us

whether or not the fresh product we specify in our formula has been used.

We also receive from the dairy a certified analysis of the mix to insure the bacteria and coli content and butterfat content.

Q. In purchasing these flavorings made to your order and these toppings made to your order, do you buy in wholesale quantities?

A. Yes, we do.

Q. Do you buy them at a jobber's discount price?

A. I don't think there would be any jobber's discount price because in the case of most of the items they are not made for anybody other than us.

—3616—

Q. Do you buy at wholesale prices because of your quantities?

A. We buy on a contract price which is the equivalent of a wholesale price.

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Cross examination.

By Mr. Rothstein:

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—3617—

Q. You, of course, give specifications to the dealer as to what percentage of flavoring to add to the mix, is that true?

A. All of our flavoring are packaged in single-service containers to flavor in a specified amount of mix.

In other words we pack the flavoring of strawberry puree, for instance, in a No. 10 tin and that exact amount will flavor a 10-gallon can of mix. We pack the cocoa powder in a bag that contains exactly the amount of cocoa powder to flavor a 10-gallon can of mix.

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—3623—

Q. The dealer, in other words, cannot use a plain stick without the name Carvel printed on it with the Lollapalooza product, can he?

A. I believe that only Lollapalooza is printed on the stick, and that is the trademark of the item that identifies it.

Q. In selling the Lollapalooza to the public the dealer may not use a plain, unprinted stick; isn't that so?

A. No, the printed trademark of the item Lollapallooza is on the stick.

Q. Which he purchases from Carvel?

A. No, when he sells it to the customer to identify the item as a Lollapalooza.

Q. Where does he obtain the sticks from?

A. He can obtain the sticks from any place he wishes. Most of them buy them from us since the price is favorable.

Q. Is the dealer permitted under the Carvel franchise agreement to use or sell the Lollapalooza on an unmarked stick.

A. No, he is not.

. . . . . .

—3624—

The Court: Who owns the trademark on Lollapalooza?

The Witness: The trademark, I believe, is owned by Thomas Carvel and the use of it is granted to the various franchising corporations.

Q. On Lollapaloozas, incidentally, this particular item is packaged in a little paper covering or something of the sort, is it not?

A. It is packaged in a paper bag that also says "Lollapalooza".

Q. It has the name Lollapalooza on it?

A. Yes.

Q. So, from the paper bag, it is identifiable from the trademark Lollapalooza; isn't that so?

A. If it is sold in the bag.

Q. But it must be sold in the bag by the Carvel dealer; isn't that so?

A. No, at times they are sold in boxes and the bag is not included.

Q. The box has the trademark Lollapalooza on it.

A. No, it doesn't. It has only the Carvel trademark, not the Lollapalooza trademark.

Q. Can you tell me whether printed paper goods affect

—3625—

the quality of the finished product that is sold in the store?

A. They may, yes, sir.

Q. In what respect would printed paper goods affect the quality of the end product that is sold in the Carvel store?

A. The paper goods, if they were not of the specifications for the board, which is the paper, the initial paper, and for the wax or lamination that is on the paper could materially affect the product. For instance, if you used a wax-lined soda cup in serving sodas you would probably get small pieces of wax on top of the soda which would be distasteful to the customer and materially affect the quality of the product. If you use a laminated cup, you don't get that.

Q. Would this apply to an ordinary paper sack in which a product is put so a customer can carry it home?

A. It might very well if you used a common brown bag. It could transmit a flavor to the ice cream.

Q. And are Carvel suppliers of printed paper goods the only suppliers who produce this type of paper goods?

A. We supply the paper goods to the stores. We contract with various manufacturers of paper goods to manufacture the items that we specify.

—3626—

Q. Do you know whether other than the manufacturers with whom you contract there are other suppliers who supply paper goods of a similar quality?

A. I would assume that there are, yes.

Q. Have you ever advised any of your operators of the specifications you require for printed paper goods?

A. No one has ever requested them.

Q. I asked whether you ever advised any of your operators of those specifications.

A. We never have, since no one has ever requested them.

Q. Now, coming back to the formula for mix, you told us and I think I'm repeating myself, that it is uniform throughout the chain?

A. That is correct.

Q. And that is in every state in which Carvel stores are operated?

A. That is correct, with the exception of Wisconsin, and there the uniformity is exactly the same as every place else with the exception of the butter fat content.

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—3627—

Q. Carvel contracts with suppliers other than mix suppliers to furnish to Carvel various ingredients and products that are used in the operation of the business; is that not so?

A. Yes, we do.

Q. And Carvel exacts from these suppliers a certain standard of quality?

A. We specify the standard of quality.

Q. Yes. Is that true with respect to every product that Carvel purchases or has produced by other suppliers for use in the Carvel stores?

A. Yes, I believe it is.

Q. And with respect to the standards that you specify, are they any different than the suppliers made by such

—3628—

suppliers for the non-Carvel trade?

A. Yes, they are.

Q. This is to your knowledge?

A. Yes, sir.

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—3632—

Q. Now, you have a product called a thick shake, have you not, that is an end product produced by the store?

A. That is correct.

Q. And this product is produced, like all the products

—3633—

in the stores, according to Carvel specifications or recipes? recipes?

A. Recipes, yes.

Q. This product is not uniform throughout the chain, is it?

A. Yes, it is.

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—3634—

Q. Mr. Vettel, when the ice cream is drawn from the freezer to make a cone or whatever product is being sold, it comes out of this front plate assembly, this spout?

A. Yes.

Q. Is that so?

A. Yes, sir.

Q. When the cone or whatever other container is filed, the spout is closed?

A. That is correct.

Q. And I take it there is a handle that can open or close it?

A. That is correct.

Q. Now, is there not a residue of ice cream that remains in that spout after it is closed?

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—3635—

A. Yes, there is.

Q. And is it not so that that particular portion of the spout from which the ice cream comes is not under refrigeration?

A. No, that is not so. I hope I made myself clear. What you said is not so.

Q. Is that due to a recent change in the manufacture or construction of that spout so that it is now completely under refrigeration?

A. I don't know what you mean by "recent."

Q. Was there a time in the operation of the Carvel stores when that part of the spout through which the ice cream came was not under refrigeration?

A. Some eight or ten years ago, yes.

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—3642—

LESTER N. MODICK, called as a witness on behalf of plaintiffs, in rebuttal, being first duly sworn, testifies as follows:

Direct examination.

By Mr. Rothstein:

—3646—

Mr. Rothstein: Might I be heard? I just want to say this, I wasn't aware this case was proceeding as an unfair competition case.

The Court: There is an element of trade-mark protection in the case which has a very definite bearing on your cause of action relating to the anti-trust laws. The United States Supreme Court and other courts have held that you can't pass off goods under a name—take the gasoline cases.

Mr. Rothstein: I don't quarrel with that.

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—3654—

Q. Did you ever receive any signs or posters from Carvel in which the place for the insertion of the price was left blank?

A. Yes, I received one poster that was completely blank with just the Carvel name on the top. That is all, nothing in it, no written item in it. That is the only thing on it.

—3655—

Q. Do you mean there was no product mentioned on it?

A. No, it just had Carvel's name and a blank piece of paper below it.

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—3658—

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Cross examination.

By Mr. Weisman:

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—3661—

Q. Isn't it a fact that you testified to having sold 15-cent cones at your store?

A. I sold a 15-cent cone.

Q. That was not any part of the so-called standard prices

—3662—

of 10 cents or 20 cents?

A. I was reprimanded by Carvel for doing so.

Q. Do you recall an incident where in the presence of a Carvel supervisor you sold a customer a 50-cent cone?

A. That is right, and I was reprimanded for that too.

• • • • • • •

The Court: What do you get for a 50-cent cone? I would like to buy one.

The Witness: When a man comes in and says, "Make me the biggest cone you got," you certainly make every effort to sell him something because you want some business.

The Court: How much ice cream is in the 50-cent cone?

The Witness: If your machine is working right and you can do it, the chap has to be a person who can eat very fast, but it will be about 24 inches high and all you have to do is hold it. You make sure he is going to take it outdoors and eat it fast, otherwise you will take a mop with you.

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Colloquy Between Court and Counsel

—3669—

The Court: What is next?

Mr. Rothstein: This is in the case of Dominick Izzo.

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Mr. Rothstein: I'm offering this in rebuttal, Mr. Weisman. It was not on my list.

The Court: What are you offering, an affidavit or an admission?

Mr. Rothstein: Yes. It is an answer, your Honor.

The Court: Let me see it.

—3670—

Mr. Rothstein: Yes, sir. Carvel was the defendant here. This is the answer.

The Court: Are you offering it in evidence?

Mr. Rothstein: Yes, your Honor. I have reference to paragraph 16.

* * * * * * *

The Court: This is an answer put in by Carvel, and I will read it and take it into account. This is paragraph 16 of the answer. It says:

> "Defendant's franchised business now encompasses over 350 independent franchised dealers, each operating from the same unique patent design building under the same trade names and trademarks and each manufacturing and selling distinctive trademarked frozen dairy products and each using defendant's custom-made patented freezers and allied equipment and each using and displaying defendant's patented loan equipment. The public has come to associate and identify the defendant's trademarked products and trade name with the defendant's patented design building, custom-

—3671—

> built equipment, signs and insignia and special business techniques."

I will take that for what it is worth. If you didn't put it in, the defendants would have.

* * * * * * *

PLAINTIFFS' EXHIBIT 1

Copyright 1955

By: Carvel

CARVEL STORES OF NEW YORK, INC.

FRANCHISE CONTRACT No. 000468

DEALER'S FRANCHISE AGREEMENT

Store No. 243

Location: 5425 Rising Sun Ave., Philadelphia, Philadelphia County, Pennsylvania

AGREEMENT made this 12th day of April, 1956, by and between CARVEL STORES OF NEW YORK, Inc., a domestic corporation of the State of New York, having offices at 80 Woodworth Avenue, Yonkers, New York, (hereinafter referred to as "Carvel"), and James Pierce & Rita Pierce, his wife, of 149 E. 31st St., Brooklyn, N. Y. (hereinafter referred to as the "Dealer");

PREAMBLE

There has been created a unique system for the production, creation, sale and distribution at retail, of Carvel's Frozen Dairy Products made up in Carvel forms and with toppings and flavorings made in accordance with Carvel Specifications and formula sold in connection therewith. This Frozen Dairy Product is made in accordance with a Carvel formula, consisting of high quality ingredients, and is sold in fine sanitary stores, which are created in accordance with patented designs and specifications. The public has been accustomed to seek Carvel's Frozen Dairy Product at these unique Carvel Stores (as hereinafter defined), and to purchase therefrom Carvel's Frozen Dairy Product manufactured in accordance with the Carvel formula and none other. The Dealer desires to operate a Carvel Store and Carvel is willing and agrees that the Dealer operate a Carvel Store in accordance with the terms of this agreement. So that the parties may fully understand the terms referred to herein, the following are important definitions:

DEFINITIONS:

1. Carvel Store

By the term "Carvel Store," the parties mean certain premises owned or leased by the Dealer and a store created thereon, designed in accordance with patented designs and erected in accordance with Carvel plans and specifications. The equipment of the Carvel Store is all in accordance with Carvel specifications for equipment, as contained in the Standard Operating Procedure Manual (hereinafter referred to as the "Manual"). This Carvel Store shall at all times be maintained and operated in accordance with the specifications provisions of the Manual, and the Dealer shall have no right to make any changes or alterations in and to the said Carvel Store, not authorized in writing by Carvel. It must at all times display the advertising material as specified by Carvel and none other, and the Dealer must observe the sanitary and other conditions prescribed in the Manual for the said Store. It must be operated during 9 months of the year, and the hours of the day, specified in the Manual.

2. Dealer

The "Dealer" described in this agreement is a person who, upon the execution hereof, has undertaken the obligation to perform all the terms and conditions of this agreement and of the Manual in the Carvel Store at the place specified. If the Dealer is an individual, he represents and warrants himself to be of good character and reputation, and to be prepared and financially able to accept the obligations set forth herein; he recognizes that, in this contract, he is undertaking obligations to Carvel, to the public that purchases Carvel's Frozen Dairy Product, and to himself. In the event that the Dealer is a partnership, the above reference to an individual shall apply to each partner.

3. The Standard Operating Procedure Manual

By "Standard Operating Procedure Manual," the parties mean a handbook of operations prepared by Carvel, which includes the store specifications, equipment specifications,

the method of operation of a Carvel Store and similar requirements, all as set forth in the book entitled "Standard Operating Procedure Manual," delivered to the Dealer on the signing of this agreement: This book is hereinafter referred to as the "Manual." From time to time, in the light of experience, changes in the Manual may be necessary for the successful operation of a Carvel Store. Such changes will be in writing and copies thereof forwarded to the Dealer for inclusion in the Manual. Unless the Dealer objects to the changes in the Manual within five (5) days after the receipt thereof by the Dealer, then such changes shall be deemed to be a part of the Manual with the same force and effect as if included therein at the time of this agreement. It is agreed, however, that Carvel shall have the right to require all changes in the Manual, including the specifications set forth therein, which deal with the composition of Carvel's Frozen Dairy Product, or which are necessary for the protection of Carvel's trademark. The Manual shall be deemed to be an integral part of this agreement with the same force and effect as if it were physically included herein.

NOW THEREFORE, in consideration of the preambles to this agreement, and the mutual promises herein conveyed, the parties hereto agree as follows:

FIRST: Carvel herewith appoints the Dealer and the Dealer herewith accepts such appointment as the authorized Carvel Dealer upon the terms, covenants and conditions set forth in this agreement. Such appointment shall commence on the date when the Dealer opens or commences to operate a Carvel Store as hereinafter defined and shall terminate as set forth in this agreement.

SECOND: The terms of this agreement shall be from the date of the agreement to the 31st day of October, 1966.

THIRD: This agreement shall be automatically renewed for an additional period of 10 years upon all of the terms and conditions of this agreement as herein provided, unless either party shall indicate the desire to terminate the agreement upon the expiration date hereinbefore set forth by notice given by registered mail at least one hundred and twenty (120) days prior to the expiration date fixed in the

foregoing paragraph. At the renewal thereof, the Manual as herein specified by Carvel with all suggested changes to the date of renewal, whether previously accepted or not, shall then become a part of the renewed agreement.

FOURTH: During the terms of this agreement, the Dealer agrees to sell at the Carvel Store, Carvel's Frozen Dairy P[illegible] uct solely in accordance with the Manual and will sell no other product except as hereinafter expressly otherwise provided. If at any time the Dealer fails to maintain and operate a Carvel Store in accordance with the definition contained in this agreement and in the Manual, then the Dealer's failure to do so shall be deemed to be a breach of a vital term of this agreement and shall entitle Carvel, upon giving written notice to the Dealer, to terminate this agreement.

FIFTH: The parties recognize the necessity for operation in accordance with the standards set forth in the Manual and agree that Carvel inspectors and officers shall, for the protection of the Dealer, the public and Carvel, and its trade-marks and trade-names, make periodic inspections of the Carvel Store and of the operations, and the Dealer consents to such inspections at any and all times desired by Carvel. The Dealer will promptly correct any errors or omissions found by such inspectors and officers.

SIXTH: In order to safeguard the integrity of Carvel's trade-marks, the Dealer agrees that he will purchase from Carvel or from approved sources designated by Carvel, his entire requirements of Carvel's Frozen Dairy Product mix, toppings, flavorings and other ingredients, cones and any other items sold as a part of the end product that is offered for consumption to the retail purchaser as scheduled in the Standard Operating Procedure Manual at prices indicated therein; which prices are subject to Carvel having the right but not the obligation to increase or decrease the price charged in the event that any of the items of cost increase or decrease during the term of this agreement. The Dealer agrees to rely solely on Carvel's determination of price, from time to time. Payment therefore shall be made by the Dealer to Carvel upon the receipt by

the Dealer of a Carvel invoice therefor. Carvel agrees to sell to the Dealer the Dealer's requirements of supplies set forth in this paragraph, unless prevented therefrom by act of God, governmental restrictions, labor difficulties, inability to obtain supplies, or similar contingency.

SEVENTH: Carvel shall instruct the Dealer in the production of Carvel's Frozen Dairy Product, in its various forms, and in Carvel's merchandising methods and techniques. Carvel shall arrange for the training of the Dealer in the manner set forth in the Manual. The Dealer shall have the right to use the name "Carvel" in connection with the sale of Carvel's Frozen Dairy Product. As compensation for all of the foregoing, the Dealer agrees to pay the Company compensation of 25¢ per liquid gallon. On January 2nd of each year such compensation shall be adjusted in accordance with the following formula; One cent shall be added to or subtracted from such royalty for each full 4.0 change in the Bureau of Labor Statistics Consumer's Price Index, All Items and Commodity Groups (1947-1949-100) from a base of 115.0, provided, however, that in no event shall royalty be less than 25¢ per liquid gallon. In the event that the index referred to above is amended or modified, such revised index shall be applicable in accordance with conversion procedures promulgated by the Bureau of Labor Statistics. The Dealer agrees to make payment promptly upon presentation of invoice.

EIGHTH: The Dealer shall have the right to sell Carvel's Frozen Dairy Product and/or other items authorized for sale by him under the terms of this agreement at any price that the Dealer determines. Wherever Carvel recommends a retail price, such recommendation is based upon Carvel's experience concerning all factors that enter into a proper price, but such recommendation is in no manner binding upon the dealer.

NINTH: In connection with the operation of a Carvel Store and to comply with the specifications set forth in the Manual, the Dealer is required to purchase various items of machinery and equipment, and paper goods, a list of which is set forth in the Manual. To the extent that Carvel

is able to supply the same, the Dealer shall have the right to purchase such machinery, equipment and paper goods, if he so desires, from Carvel, at prices fixed by Carvel from time to time. The Dealer's obligation under this paragraph is satisfied so long as the Dealer equips his store and keeps it maintained in accordance with the specifications contained in the Manual. In the event that the Dealer desires to purchase his printed paper goods from sources other than Carvel, Carvel shall license manufacturers of such products to print the Carvel name thereon in connection with sales to the Dealer, with products made in accordance with Carvel standards.

TENTH: The Dealer agrees that he will undergo a period of training for the operation of a Carvel Store in a manner set forth in the Manual. The Dealer shall provide the Store with adequate employees of his own, shall pay them in accordance with applicable laws and regulations and shall carry workmen's compensation therefor.

ELEVENTH: The Dealer agrees that he will devote his best efforts and his entire time to the operation of the Carvel Store herein mentioned.

TWELFTH: So long as the Dealer complies with all of the terms of this contract, Carvel agrees that it will not own, operate, or franchise any retail store for the sale of Frozen Dairy Products within ½ mile in a metropolitan area or 2 miles in a suburban area in either direction of the store on Rising Sun Ave., Philadelphia, Pa. This contract is deemed to cover a metropolitan area.

THIRTEENTH: The Dealer will keep full and complete records of the conduct of the business and in particular records of all mix used and processed in the operation of the Carvel Store as prescribed from time to time, and shall permit representatives of Carvel to make copies and extracts from the Dealer's books and records as may be required from time to time by Carvel.

FOURTEENTH: The Dealer will open the Carvel Store referred to in this agreement as a Carvel Store on or before the 1st day of May, 1956, provided that the opening may be

delayed if such delay is caused by an Act of God, government restrictions, labor difficulties, inability to obtain building material, or similar contingencies not within the control of the Dealer.

FIFTEENTH: The Dealer will not permit the use of the store or premises on which the store is located for any illegal business or purposes whatsoever.

SIXTEENTH: The Dealer shall have the right to install one soft-drink cup dispenser vending machine and one cigarette vending machine at such place or places, at the outside of the store only, as may be approved by Carvel.

SEVENTEENTH: In the event that the Dealer should breach any of the terms of this agreement, or default in the performance of any of the obligations under the Manual, or shall fail to fully perform all of the terms and conditions of the lease, if any, under which the Dealer occupied the premises, or if the Dealer's lease or ownership in the premises shall pass to another without the consent of Carvel, or if for any reason the Dealer loses the right to occupy or use any part of the premises on which the store is located, and should such breach not be remedied to the satisfaction of Carvel by the Dealer within forty-eight (48) hours or such later time as Carvel may specify in a written notice to the Dealer, or if such violation is repeated Carvel shall have the right to terminate this agreement forthwith by written notice to that effect mailed to the Dealer and then this agreement shall terminate fully and in all respects, and the Dealer shall then have no further rights hereunder. The Dealer recognizes that his Carvel Store is one of a large number of stores similarly built and selling to the public similar products, and hence the failure on the part of a single dealer to comply with many of the terms of this agreement could cause irreparable damage to all similar stores. Therefore, in the event of a breach or threatened breach by the Dealer of any of the covenants or provisions of this agreement, Carvel shall have the immediate right to secure an order enjoining any such breach or threatened breach, and, if the agreement has been terminated, the Dealer may be enjoined from any continued operation of

the Carvel Store, or any other operation in violation of the agreement.

EIGHTEENTH: If the Dealer becomes insolvent, or commits an act of bankruptcy, or makes a general assignment for the benefit of creditors, or to an agent authorized to liquidate his property or assets, or becomes involuntarily a bankrupt, or voluntarily files a petition in bankruptcy or reorganization, or effects a plan or other arrangements with creditors, or files an answer to the creditors' petition or other petitions filed against him (admitting the material allegations thereof) for an adjudication or for reorganization, or effects a plan or other arrangement with creditors, or applies for or suffers the appointment of a receiver or trustee of any of his assets or property, or such receiver or trustee is appointed for any of his properties or assets, or all or substantially all of his properties is assumed by the United States or any officer or instrumentality thereof, or if a substantial part of the property on which the store is located is taken by eminent domain, or a writ or a warrant of attachment or levy on a judgment or other similar process is issued by any court against all or any substantial portion of the property of the Dealer, if such writs, warrant or attachment, levy on a judgment or any similar process is not removed and discharged within ten (10) days after entry, levy or service, or permits the use of the premises and/or store for any illegal purpose, then this agreement shall be deemed breached and terminated without further notice from Carvel.

NINETEENTH: The Dealer during the life of this agreement will not, without the written permission of Carvel, mortgage, pledge, encumber, or otherwise assign as security, the premises herein described or any part thereof, or the equipment or furnishings located and used thereon, or any interest therein.

TWENTIETH: This agreement is not assignable by the Dealer. The parties hereto have entered into a separate "Option to Purchase Agreement" and should the Dealer desire to sell the business of the Carvel Store at the premises, and in the event that Carvel does not exercise its option to purchase under the terms of the Option to Pur-

chase Agreement, then and in that event only, should the Dealer desire to sell the business of the Carvel Store at the premises, this agreement may be surrendered for cancellation and the business sold upon the following terms and conditions:

(A) That the purchaser be a financially responsible person, of good moral character and reputation satisfactory to Carvel;

(B) That the purchaser shall enter into a new agreement with Carvel, assuming all the terms and conditions of such standard Dealer's Franchise Agreement as then exists at the time of such purchase, which new agreement shall, however, provide for the same compensation as provided in Paragraph 7 herein surcharge or royalty as provided herein, and purchaser will enter into all other agreements required by the new agreement;

(C) That all obligations for merchandise, equipment on lease or on any open account shall be paid in full, and that the Dealer shall have fully and faithfully compiled with all the terms and conditions of this agreement up to such date of contemplated sale of said business, and that the Dealer, at the time of surrender of this agreement shall execute a general release to Carvel;

(D) That in consideration of the acceptance of the surrender, the drawing of any and all legal documents to effect the same, and the insurance and execution of new agreements to the purchaser, that there be paid to Carvel the sum of Five Hundred ($500.00) Dollars, to compensate Carvel for expense in connection therewith.

TWENTY-FIRST: Should this contract be terminated for any reason whatsoever (including expiration), Carvel is specifically authorized, permitted and has the right without any liability, to enter upon and remove from the Dealer's premises at the Dealer's expense all property belonging to Carvel and all identification bearing the name or insignia of Carvel and any and all other display items and personalty owned by Carvel.

TWENTY-SECOND: Nothing herein contained shall be construed to give the Dealer any right or license in or to

the use of the Carvel name or of any symbol, device or design of Carvel, other than as is specifically authorized hereunder or as may be hereafter authorized by Carvel in writing, and any use thereof so permitted by Carvel shall terminate on the date fixed for the expiration of the term of this agreement, or on termination date of any extension Dealer acknowledges the validity of all trade-marks and patents owned by Carvel, or under which it operates as licensee, and recognizes its obligation to protect such licenses and patents, and discontinue the use thereof upon termination of this agreement.

TWENTY-THIRD: This agreement shall not be construed as constituting the Dealer an agent, servant, representative or employee of Carvel for any purpose whatsoever. The Dealer is not granted any right or authority to assume or create any obligation or responsibility, express or implied, on behalf of or in the name of Carvel, or to bind Carvel in any manner or thing whatsoever.

TWENTY-FOURTH: The Dealer, during the entire term of this agreement, agrees that he will provide at the Dealer's expense, Public Liability Insurance with companies reasonably satisfactory to Carvel, with limits of $100,000/$300,000 covering the operation and premises of the Carvel Store, which insurance shall be issued in the name of the Dealer, Carvel, and the landlord of the Carvel Store, if required by the terms of any lease agreement entered into simultaneously with this agreement, as their respective interests may appear, and certificate therefor be delivered to Carvel; and further, the Dealer agrees that during the entire term of this agreement, to carry at the Dealer's expense, Products Liability Insurance, with companies reasonably satisfactory to Carvel, with limits of $100,000/$300,000, endorsed similarly as the Public Liability Insurance, and certificate also to be delivered to Carvel, and the Dealer further agrees to hold Carvel free and harmless from any and all claims, damages, choses in action, suits or rights of any parties, persons or corporations arising from the operation of the Carvel Store at the premises hereinbefore mentioned, during the entire term of this agreement.

TWENTY-FIFTH: The failure of Carvel to enforce at any time or to object to the failure to perform any term, provision or condition of this agreement or to exercise any option herein given, or to require at any time performance by the Dealer of any term, provision or condition hereof, shall in no wise constitute a waiver thereof of any subsequent breach or affect the validity of this agreement or any part thereof, or the right of Carvel thereafter to enforce the same, but shall apply only to the specific instance to which the waiver is directed.

TWENTY-SIXTH: It is mutually understood and agreed that if any part of this agreement shall be held to be contrary to public policy or unenforceable, such finding shall not invalidate any other part of this agreement. However, in such event, Carvel shall have the option at any time thereafter of terminating this agreement upon ten (10) days notice to the Dealer without further liability.

TWENTY-SEVENTH: This agreement contains all oral and written agreements, representations and arrangements between the parties hereto, and any rights which the respective parties hereto may have had under any other previous contracts are hereby cancelled and terminated, and no representations or warranties are made or implied, except as specifically set forth herein. This agreement cannot be changed or terminated orally.

TWENTY-EIGHTH: It is mutually understood and agreed that this agreement shall be deemed to have been made in the State of New York, and any and all performance thereunder, or breach thereof shall be interpreted and construed pursuant to the laws of the State of New York.

TWENTY-NINTH: It is mutually understood and agreed that all notices and communications shall be in writing and addressed and sent by registered mail as follows: To Carvel at 80 Woodworth Avenue, Yonkers, New York. and to the Dealer at the Dealer's store premises as herein specified. All such notices and communications shall be deemed to be given, delivered or served upon the mailing thereof.

THIRTIETH: The rights and remedies of Carvel specifically provided for herein shall not be exclusive, but shall

be in addition to any other rights and remedies to which Carvel shall be entitled at law or otherwise.

TH Y-FIRST: In the event that Carvel exercises its option to repurchase the Carvel Store, as referred to in Paragraph "Twentieth" thereof, or in the event that Carvel fails to exercise said option but the Dealer sells the business in the manner provided for in said Paragraph "Twentieth," and a Carvel Store is thereafter operated as such on the premises, or in the event that the Dealer breaches the provisions of this agreement and this agreement is thereupon terminated, and a Carvel Store is operated on the premises by Carvel or another franchised dealer, than for a period of five (5) years after the transfer of the Carvel Store the Dealer, if an individual, will not, either directly or indirectly, become interested or engage in, as an individual, partner, officer, director, stockholder or employee, of any business engaged in the production, distribution or sale of frozen dairy products within a radius of twenty-five (25) mile from the location of the Carvel Store herein mentioned. The provisions of this paragraph shall survive the expiration or termination of this agreement.

THIRTY-SECOND: (a) If, at the inception of this agreement, the Dealer does not operate a "B" Unit Building as described in the Manual and as established and known in the Carvel Store chain, and if the gross sales in operation of the Dealer's Carvel Store shall exceed Forty-Five thousand ($45,000) Dollars in any one calendar year during the term of this agreement, then the Dealer agrees, when requested by Carvel in writing to do so, to install promptly such additional machinery and equipment as is required in said "B" Unit Building at that time, and to operate the same in accordance with the Manual. Such additional installation shall be made at the Dealer's own cost and expense. All the provisions of this agreement shall apply to such "B" Unit Building with the same force and effect as if herein originally provided.

(b) In accordance with the preceding paragraph, in the event that the gross sales of the Carvel Store herein mentioned shall exceed Sixty Thousand ($60,000) Dollars in any one calendar year during the term of this agreement,

then the Dealer agrees, when requested by Carvel in writing to do so, to install promptly such additional machinery and equipment as is required in an "A" Unit Building, as described in the Manual, and as established and known in the Carvel Store chain, and to operate the same in accordance with the Manual. Such additional installation shall be made at the Dealer's own cost and expense. All the provisions of this agreement shall apply to such "A" Unit Building with the same force and effect as if herein originally provided.

THIRTY-THIRD: If there be more than one person comprising the party designated as the Dealer, then all reference in this agreement shall be deemed to refer to each such person, and all such persons shall be jointly and severally liable hereunder. Words of any gender used in this agreement shall be construed to mean corresponding words of any other gender, and words in the singular number shall be construed to mean corresponding words in the plural, when the context so requires.

THIRTY-FOURTH: This agreement shall be binding upon and enure to the benefit of the respective heirs, executors, administrators, successors and assigns of the parties thereto.

IN WITNESS WHEREOF, the parties have caused their hands and seals to be hereunto affixed, and the corporate party has caused its name to be hereunto affixed by its duly authorized officer, and its seal to be hereunto affixed, the day and year first above written.

CARVEL STORES OF NEW YORK, INC.

By /s/ RICHARD A. CEROSKY (SEAL)
President

/s/ JAMES P. PIERCE (L.S.)
(Dealer)

/s/ RITA E. PIERCE (L.S.)
(Dealer)

/s/ J. W. GITTENS
Witness

PLAINTIFFS' EXHIBIT 2

FRANCHISE AGREEMENT

STORE No. 274

FRANCHISE CONTRACT No. 000474

AGREEMENT made this 17th day of July, 1954, by and between Carvel Dari-Freeze Stores, Inc., a domestic corporation of the State of New York having offices at 95 So. Central Ave., Hartsdale, N. Y. hereinafter referred to as "Carvel:" and Bernard and Gertrude Susser, and Shirley Schwartz of 60 Plaza Street County of Kings State of New York hereinafter referred to as "Operator,"

WITNESSETH:

WHEREAS, Carvel has the exclusive right of use and license to use the names Carvel and Dari-Freeze and the right to sub-license the use of said names for the establishment and operation of a Carvel Dari-Freeze Store.

WHEREAS, the Operator desires to operate a retail Carvel store at premises hereinafter designated and in conjunction therewith desires the right to the use of the names known as Carvel and Dari-Freeze under certain terms and conditions;

WHEREAS, Carvel is the exclusive distributor of the equipment known as Carvel Freezers and Carvel Merchandising Methods and Techniques, which the operator is desirous of obtaining together with the use of the names under certain terms and conditions; and

WHEREAS, Carvel is the exclusive distributor of the Front Assembly Plate of Carvel Freezers, more particularly identified as Part No. 5-D, Valve identified by Part No. 5-D-1, and Decorative tip identified by Part No. 5-D-2, Signs, Insignia, Crown and Cone (used in connection with a Carvel Franchise) which equipment and use thereof the Operator desires in connection with the operation of the Franchise hereinafter mentioned; and,

WHEREAS, Carvel has perfected and owns building Plans and Specifications for a Carvel Store presently used for the erection and operation of a Carvel Store only, which the Operator desires use of in conjunction with and in furtherance of the Franchise hereinafter mentioned under certain terms and conditions;

NOW THEREFORE, in consideration of $1.00 each to the other in hand paid, receipt of which is hereby acknowledged, and the mutual convenants and conditions hereinafter mentioned the parties hereto agree as follows:

1. Carvel does hereby grant unto the Operator a Franchise and license for the use of the name Carvel and Dari-Freeze in the operation of a retail Carvel Store at the location hereinafter mentioned, which the Operator does hereby accept subject to the following terms and conditions:

(a) The parties hereto agree that the Carvel Freezers, the Carvel Merchandising Methods and Techniques, the Carvel building plans and specifications, the use of the front assembly plate of Carvel Freezers, valve, decorative tip, signs, insignia, crown and cone, are of substantial value and are being used in many locations throughout the United States and that the conditions, terms, restrictions and covenants of this agreement are necessary, equitable and reasonable, for the general benefit of the parties hereto and all other franchised operators, having a legal right and interest thereto and the parties further agree that the licensing and use of the names Carvel and Dari-Freeze have a substantial value in that they are being used in the maintenance and operation of Carvel Dari-Freeze Stores throughout the United States and that restrictions, conditions, covenants, terms and limitations hereof are necessary, equitable and reasonable for the general benefit of the parties hereto as well as all other franchised operators having a right and license to use thereof.

(b) Carvel agrees to loan to the Operator by separate Loan Agreement the Front Assembly Plate of the Carvel

Freezers consisting of Front Plate identified as Part No. 5-D, Valve identified as Part No. 5-D-1, and the Decorative Tip identified by Part No. 5-D-2, Signs, Insignia, Crown and Cone, which is and shall remain at all times the property of Carvel during the life of this agreement and subject to the terms hereof.

(c) Carvel agrees to sell and the Operator agrees to purchase certain Carvel Equipment and Freezers more particularly described in the Sales Contract No. 13790 hereto annexed and made part hereof at the agreed price and terms of purchase as therein stated.

2. The Operator does hereby agree to establish, maintain and operate a Carvel Store in accordance and in compliance with all the terms and conditions of this Agreement.

3. Carvel further agrees to provide a copy of Carvel Building Plans and Specifications for the erection of a Carvel Store at the premises hereinafter mentioned. Should the parties hereto agree that the Operator is to cause the erection and building of said Carvel Store, then and in that event the Operator agrees to erect said Store and Driveways under this Franchise at the location hereinafter mentioned in accordance with such Building Plans and Specifications.

4. The Operator does hereby agree during the life of this Franchise Contract as follows:

(a) To maintain, conduct and operate a Carvel Store at the premises hereinafter mentioned conforming in all respects to the Carvel Methods, Operating Techniques and Standards and to sell therein only frozen dairy products established as standard products in Carvel Stores. All operating techniques and standards shall be subject to change by Carvel upon notice to Operator.

(b) That all merchandise purchased in said Store shall be under the Carvel label, established as such by Carvel, and Operator is to refrain from selling or dealing in any other products unless otherwise designated by Carvel.

(c) To purchase only Carvel Special Formula Mix from a source of supply designated by Carvel.

(d) To purchase from Carvel all equipment necessary for the operation of the Store at Carvel standard prices and to pay for same on terms as agreed between the parties hereto in separate Sales Contract attached hereto and made part hereof.

(e) To purchase and use only standard Carvel approved printed paper goods, nakins, cones, extracts, spoons, and all other Carvel products at standard market prices.

(f) To maintain premises in a clean and sanitary condition to conform with Carvel Standard Procedure of Operation and all Governmental, Building and Health Regulations.

(g) To hire and employ efficient operators and employees for the operation of a Carvel Dari-Freeze Store, to pay such wages as may be required by law without liability on the part of Carvel and to require all employees to work in white, clean and sanitary uniforms at all times during the operation of the business.

(h) To devote the Store and the premises described herein as the location, solely to the display of Carvel approved equipment, point of sale materials and sales of Carvel products and for no other purpose.

(i) To permit Carvel's agent to inspect the Store, stock, merchandise and equipment at all reasonable times, and if in the opinion of Carvel any of the merchandise or equipment is below standard established by Carvel; Operator agrees to remove said merchandise or equipment from the Store within five (5) days after notice at Operator's expense with no liability or obligation imposed on Carvel by reason thereof.

(j) Operator further agrees to pay a surcharge or royalty directly to Carvel of $.25 on each and every gallon of Liquid Mix used on the premises hereinfater mentioned, which surcharge or royalty shall be payable upon presentation of Carvel invoice or billing during the entire term of Franchise.

(k) Operator further agrees to keep full and complete records of the conduct of the business and in particular,

records of all mix used and processed in the operation of the Carvel Dari-Freeze Store, available for inspection by Carvel or its representatives at any time; and to permit representative of Carvel at all times during the duration of this franchise to examine and make copies and extracts from Operator's books and records relative to the conduct of the operation contemplated by this contract.

(l) Operator does hereby authorize Carvel to demand and receive on Operator's behalf a weekly accounting of the number of gallons of Mix used in the operation of a Franchise from Supplier, and the Supplier is hereby directly authorized to render such account of Mix gallons sold to the Operator, to Carvel, at such times as Carvel requests same during the life of this Agreement.

(m) To maintain all the equipment and freezers used in the operation of the store in an efficient and operative state of condition and good repair during the entire life of this agreement.

(n) That should the Operator cause the erection and building of the Carvel Store by separate agreement between the parties hereto, then and in such event, and as further consideration for the issuance of this Franchise Contract, the Operator agrees, in addition to all provisions of Paragraph 4, as follows:

(1) To pay for the erection of said Store at the premises hereinafter mentioned.

(2) To pay for the equipment in accordance with the Sales Contract hereto annexed.

(3) To black top the entire parking area of the premises used in conjunction with this Franchise Contract before opening said store for business, unless written permission is received from Carvel to the contrary.

(4) To cause the building and erection of the Carvel Store so that the same shall be free from any and all liens and encumbrance which may hinder, encumber or otherwise interfere with the normal operation of the Carvel Store.

(5) To return all Blueprints, Specifications and Plans loaned to the Operator used in the actual construction of the Carvel Store within ten (10) days after completion of the building.

(o) The Operator agrees that he will not sell any frozen or semi-frozen products other than the products processed from Carvel Mix through Carvel Dari-Freeze freezers at the location of the Carvel Dari-Freeze Store without the written approval of Carvel and agrees not to sell any other product on the premises without the written consent of Carvel.

(p) To open said location as a Carvel Store on or before February 1, 1955, or in no event later than when the Store is erected and equipment installed; in the event of any delay which is beyond the control or not caused by the party erecting the Store and installing the equipment, then and in such event the Operator agrees to open said location as a Carvel Store not later than the date when said Store is completed and equipped.

(q) The Operator agrees further that he will not permit the erection of any sign on the building or on the premises of the Carvel Dari-Freeze Store herein franchised without the written approval as to design, context or specifications of Carvel.

(r) To operation as a Carvel Franchise Store for a minimum of nine (9) months each and every year during the term of this Contract.

(s) That the Operator will during each year of the term of this franchise agreement paint the building, interior and exterior at least once annually in white as originally established.

(t) Not to permit the use of the Store or premises on which the Store is located for any illegal business or purpose whatsoever, or for any purpose other than the sale of Carvel approved products.

(u) That during the life of this agreement, at all times between sundown and closing, to use all exterior lights and interior retail room lights in the operation of said store.

(v) The Operator will during the life of this agreement carry Workmen's Compensation Insurance.

(w) During the entire life of this Franchise Contract, to maintain the interior and exterior of the Carvel Store according to the Plans and Specifications originally submitted or as originally erected without any changes, additions or alterations unless same has the written consent of Carvel.

(x) To maintain prices on products designated in, and as per Carvel Standard Operating Procedure and not to conduct any reduced-price sales of these items without written consent from Carvel.

(y) The Operator agrees that he/or they will not either directly or indirectly, as individual, partner, employee or stockholder, engage in a dairy products or competitive ice cream business during the entire term of this Franchise and License Agreement, other than at the location of premises herein franchised.

5. Carvel agrees as follows:

(a) Where the Operator is to erect the Carvel Store, Carvel agrees to provide the Operator with Carvel Building Plans and Specifications.

(b) To enter into a separate Loan Agreement which shall be deemed part of this Franchise Contract for the use of the Front Assembly Plate consisting of Front Plate identified as Part No. 5-D, Valve identified as Part No. 5-D-1, and the Decorative Tip identified as Part No. 5-D-2, Signs, Insignia, Crown and Cone and Standard Operating Procedure Manual which property shall at all times remain and be the property of Carvel and shall be for the use of the Operator at the location for so long as the Operator complies with all the terms and conditions of this Contract.

(c) To supply the Operator with available Standard Carvel Merchandising Methods and Operating Techniques. To ship all Freezers and other equipment to the premises hereinafter mentioned F.O.B. Yonkers, New York; to sup-

ply the source of all approved standard printed paper goods, napkins, cones, extracts, and all other Carvel products and kindred merchandise required for the operation of the Franchise, and supply all other equipment ordered by the Operator necessary for the operation of the Franchise Store; all of the above, however, subject to lockout strikes, acts of God or restrictions and limitations imposed by the Government or any of its agencies, availability of merchandise and/or equipment or any act or thing beyond the control of Carvel.

(d) To cause the inspection of the Store, merchandise, stock and equipment periodically in order to maintain the standards established by Carvel in its stores.

(e) For so long as the Operator complies with all the terms of this Contract, Carvel agrees that it will not own, operate, or franchise any retail store for the sale of frozen dairy products within one-half mile in either direction on Walnut St., Springfield, Massachusetts, with the exception of any Retail Chain Store operation.

6. It is mutually understood and agreed that this Franchise is granted exclusively to the Operator for the operation of a Carvel Store at 135 Walnut St., Springfield, Massachusetts location only, and shall be for a period of ten (10) years from this date, and that the entire premises herein described shall be confined and restricted for the business of the operation of a Carvel Store in the display and sale of frozen dairy products as granted by this Franchise Contract, and that said premises in its entirety shall not be used for any other business whatever without the written consent of Carvel.

(a) That the life of this Franchise Contract may be extended and renewed for additional ten (10) year periods at the option of Carvel, upon all of the same terms and conditions of this Franchise Contract, provided that Carvel indicates the exercise of the option to extend and renew this Contract for additional ten (10) year periods at least thirty (30) days prior to the expiration of each ten (10) year period, in writing by registered mail addressed to the Operator at the address of the premises. That this op-

tion to Carvel to extend and renew for additional ten (10) year periods is part of the consideration for the granting of this Franchise Contract; and upon the forwarding of the notice of exercise of the option by Carvel, this Contract shall be extended for an additional ten year period or periods as provided in said notice or notices, with the same force and effect as if this Franchise Contract originally provided for said extended period as its expiration date.

(b) Carvel agrees not to unreasonably withhold the renewal of this contract at the Operator's request, providing the Operator has fully and faithfully performed all the terms and conditions of the Franchise Contract.

7. Carvel agrees (notwithstanding anything to the contrary hereinbefore mentioned) that the Operator may install one coin operated Soft Drink Cup Dispenser of four coups or less for the sale of Soft Drinks, and one Cigarette Vending Machine, provided that those products are sold from said Vending Machines only, and that said Machines are placed and are located only on the exterior of the Store.

8. It is mutually understood and agreed by and between the parties hereto, that should the Operator breach any of the terms of this Contract, or default in the performance of any of its terms or provisions, then and in that event Carvel shall have the right of cancelling and terminating its Franchise by giving the Operator notice in writing of such breach, and should the Operator fail to cure such breach within five (5) days after the notice, this Franchise is to be terminated and come to an end at Carvel's option. Upon such termination, the Operator agrees to immediately return to Carvel the Front Assembly Plate, more particularly identified as Front Plate, Part No. 5-D, Valve, Part No. 5-D-1, and Decorative Tip, Part No. 5-D-2, and all Signs, Insignia, Crown and Cone and Standard Operating Procedure Manual, advertising materials and other personalty (subject to normal wear and tear) belonging to Carvel, ownership of which has been specifically reserved by Carvel.

9. It is mutually understood and agreed that if the Operator becomes insolvent or commits an act of bankruptcy or makes a general assignment for benefit of creditors or to an agent authorized to liquidate its property or assets, or becomes involuntarily a bankrupt or voluntarily files a petition in bankruptcy or reorganization, or to effect a plan or other arrangement with creditors or files an answer to the creditor's petition or other petitions filed against it (admitting the material allegations thereof) for an adjudication or for reorganization or to effect a plan or other arrangement with creditors, or applies for or suffers the appointment of a receiver or trustee of any of its assets or property, or such receiver or trustee is appointed for any of its properties or assets, or all or substantially all of its properties is assumed by the United States or any officer or instrumentally thereof, or a writ or a warrant of attachment or levy on a judgment or any similar process is issued by any court against all or any substantial portion of the property of the Operator if such writs, warrant of attachment, levy on a judgment or any similar process is not removed and discharged within ten (10) days after entry, levy or service, or permits the use of the premises and/or store for any illegal purpose, then this Franchise Contract shall be deemed breached and terminated.

10. It is mutually understood and agreed that upon the expiration of the term of this Contract, the Operator will surrender all of the equipment and materials loaned by Carvel pursuant to Loan Agreement, subject to ordinary wear and tear in normal use.

11. It is distinctly understood and agreed that this Franchise Contract is not assignable by the Operator. It is mutually understood and agreed by and between the parties hereto that should the Operator desire to sell the business of the Carvel Store at the premises, that this Franchise Contract may be surrendered for cancellation upon the following terms and conditions:

(a) That the purchaser be a financially responsible person.

(b) That the purchaser shall enter into a new Franchise Contract with Carvel assuming all the terms of such standard Franchise Contract as then exists at the time of such purchase, which new Franchise Contract shall however provide for the same surcharge as provided herein.

(c) That all obligations for merchandise, equipment and on any open account shall be paid in full, and that the Operator shall have fully and faithfully complied with all the terms and conditions of this Franchise Contract up to such date of contemplated sale of said business.

(d) That in consideration for the acceptance of the surrender, the drawing of any and all legal documents to effect the same, and the issuance and execution of new Franchise Contract to the purchaser, that there be paid to Carvel the sum of $500.00.

12. It is mutually understood and agreed that if the Operator fails or ceases to occupy the Store premises referred to above, or ceases to conduct herein the business contemplated by this Contract, or if the Operator's lease shall pass to another without consent of Carvel, either by voluntary act or by operation of law or otherwise, or if the Operator is owner of the premises franchised herein and transfers, sells or conveys premises in violation or contrary to the terms as herein provided, then this Franchise Contract shall be deemed breached and terminated, and all conditions of termination provided herein are to prevail. In the event that the Operator's lease is terminated by condemnation proceedings or by the exercise of the right of eminent domain by any of the authorities, or if premises are owned by Operator and are effected by condemnation proceedings or by exercise of the right of eminent domain by the authorities, whereby substantially all or part of the premises are taken which would interfere with the normal operation of a Carvel Store, then and in such event this Franchise Contract shall terminate and come to an end as if such date was originally fixed as the termination date hereof, and each of the parties shall be free from liability to each other except for any unpaid invoices and merchandise or any unpaid balance on equipment still due from the Operator.

13. (a) It is mutually understood and agreed that if the Operator is a corporation and there be the sale or transfer of any of its capital stock without prior written consent of Carvel, then this Contract shall come to an end at the option of Carvel. Such consent will not be unreasonably withheld.

(b) It is mutually understood and agreed that if there be more than one person comprising the party designated as the Operator, such persons shall be jointly and severally liable hereunder, or if the Operator is a corporation the person or persons owning the majority of such corporation's stock shall personally guarantee the performance of each and every item of this contract on the part of the Operator to be performed.

14. It is mutually understood and agreed that should this Contract be terminated for any reason whatsoever (including expiration), Carvel is specifically authorized, permitted and has the right without any liability to enter upon and remove from the Operator's premises at the Operator's expense all property belonging to Carvel and all identification bearing the name or insignia of Carvel and any and all other display items and personalty, ownership of which was reserved in this Contract.

15. It is mutually understood and agreed that if the Operator is the lessee of the premises wherein the business which is the subject of this Contract is to be conducted, Operator agrees that should this Contract be terminated for any reason whatsoever (including expiration), Carvel shall have the option, by giving Operator notice in writing five (5) days following such termination, to acquire the lease of the Operator of said premises, the unexpired term of which lease Operator agrees to assign without payment of any further sum of compensation therefor, the consideration for which is part of the granting of this Franchise Contract.

16. It is mutually understood and agreed that if this Contract is terminated for any reason whatsoever (including expiration), Carvel shall have the option of purchasing all the Operator's right, title and interest in and to Carvel

Freezers upon giving the Operator notice in writing to that effect within five (5) days following such termination, the cost of such Freezers shall be based upon initial cost thereof less depreciation of 50% during the first year after purchase and 10% additional for the second year after purchase and a further sum of 5% for each year thereafter.

17. Nothing herein contained shall be construed to give Operator any right or license in or to the use of the Carvel name or of any symbol, device or design of Carvel, other than as is specifically authorized hereunder or as may be hereafter authorized by Carvel in writing, and any use thereof so permitted by Carvel shall terminate on the date fixed for the expiration of the terms of this Contract, or on termination date of any extension or renewal hereof, or upon any earlier termination or cancellation hereof pursuant to terms of this Contract.

18. It is mutually understood and agreed that this Contract shall not be construed as constituting Operator an agent, servant, representative or employee of Carvel for any purpose whatsoever. Operator is not granted any right or authority to assume or create any obligation or responsibility express or implied on behalf of or in the name of Carvel or to bind Carvel in any manner or thing whatsoever.

(a) It is mutually understood and agreed that the Operator during the entire term of this Franchise Contract will provide at the Operator's expense public liability insurance with limits of $100,000.00 to $300,000.00 covering the operation and premises of the Carvel Store, which insurance shall be issued in the name of the Operator and Carvel, as Carvel's interest may appear, and certificate therefor be delivered to Carvel; and further the Operator agrees that during the entire term of this Franchise to carry at the Operator's expense product's liability insurance with limits of $100/300,000.; endorsed similarly as the public liability insurance, and certificate also to be delivered to Carvel; and the Operator further agrees to hold Carvel free and

harmless from any and all claims, damages, choses in action, suits or rights of any parties, persons or corporation arising from the operation of the Carvel Store at the premises hereinbefore mentioned during the entire term of this Franchise.

19. It is mutually understood and agreed that the failure of Carvel to enforce at any time or to object to the failure to perform any term, provision or condition of this Contract or to exercise any option herein given, or to require at any time performance by the Operator of any term, provision or condition hereof, shall in no wise constitute a waiver thereof or any subsequent breach or affect the validity of this Contract or any part thereof, or the right of Carvel thereafter to enforce same.

20. It is mutually understood and agreed that if any part of this Contract shall be held to be contrary to public policy or unenforceable, such finding shall not invalidate any other part of this Contract. However, in such event Carvel shall have the option at any time thereafter of terminating this Contract upon ten (10) days notice to the Operator without further liability, and all provisions of termination shall prevail.

21. This Contract contains all oral and written agreements, representations and arrangements between the parties hereto, and any rights which the respective parties hereto may have had under any other previous contracts are hereby cancelled and terminated, and no representations or warranties are made or implied other than herein set forth.

22. It is mutually understood and agreed that this Contract shall be deemed to have been made in the State of Massachusetts, and any and all performance thereunder or breach thereof shall be interpreted and construed pursuant to the laws of the State of Massachusetts.

23. It is mutually understood and agreed that all notices and communications shall be in writing and addressed and sent by registered mail as follows: To: Carvel Dari-Freeze Stores, Inc., 93 So. Central Ave., Hartsdale, New

York; and to Operator at the Operator's Store premises above specified. All such notices and communications shall be deemed to be given, delivered or served upon the mailing thereof.

24. It is mutually understood and agreed that the rights and remedies of Carvel specifically provided for herein shall not be exclusive, but shall be in addition to any other rights and remedies to which Carvel shall be entitled at law or otherwise.

25. It is mutually and distinctly understood and agreed by and between the parties hereto that Carvel shall have the option of cancelling and terminating this Contract upon five (5) days written notice in the event that the Operator does not have a valid subsisting lease for a term of not less than ten (10) years in his name for said premises for the operation of a Carvel Store or have title to the premises in the Operator's name on or before Feb. 1, 1955. In such event that the parties hereto agree that Carvel having expended its time, skill, attention and expense in the preparation and promotion for the establishing of this particular Store, that the sum of $1,500.00 shall be deemed liquidated damages payable to Carvel for failure by the Operator to abide by the terms of this Paragraph and shall be due and payable to Carvel immediately upon termination or deductible by Carvel from or out of any of the Operator's monies deposited with Carvel; upon such payment or deduction there shall be no further liability of either party to the other arising from this Contract, time being of the essence. In the event of cancellation and termination by Carvel as hereinbefore provided, all materials, building plans and specifications, all operating methods and procedures and all written information furnished to the Operator shall be immediately returned to Carvel.

26. In the event that the Operator breaches any term of this Contract on it's part to be performed and cancellation of this Franchise Contract is effected by Carvel's termination for reason thereof, in view of the difficulties that arise under such circumstances to determine and fix

damages sustained by Carvel by reason of such Operator's breach, for reason of the expense, promotion and establishment of the Carvel Store, the exploitation of Carvel Methods and Techniques, Building Plans and Specifications, the granting of the Franchise, all of which is incurred by Carvel, and the inability to establish a Carvel Store in the location or restricted area of the premises franchised herein during the existence of this Franchise Contract; the parties hereto agree that in such event the damages shall be fixed as liquidated damages between the parties hereto payable by the Operator to Carvel, and shall be in the sum of $3,500.00 payable immediately upon termination. This provisivon of liquidated damages shall in no wise affect Carvel's rights to purchase the Carvel Freezers in accordance with Paragraph No. 16 hereof.

27. Not withstanding anything to the contrary hereinbefore mentioned, it is mutually understood and agreed that in the event that this Franchise Contract is cancelled and terminated by virtue of a breach of its terms by the Operator or in the event that this Franchise Agreement is terminated on termination date as hereinbefore set forth, that in either of such events for reason of the inability on the part of the parties hereto to fix the damage that may be sustained by Carvel the parties hereto distinctly agree as follows: That the Operator at such time of termination and/or cancellation agrees that he or they or it will not become interested in, engaged in directly or indirectly as an individual, officer, stockholder, partner or employee in the sale of frozen dairy products for a period of five (5) years after the date of termination and/or cancellation.

28. It is mutually understood and agreed that as part of the terms of this Franchise Agreement and in consideration for the issuance thereof and in furtherance of the faithful compliance of all the terms and conditions on the Operator's part to be performed, the Operator agrees simultaneously herewith to execute and deliver a conditional assignment of lease on the premises to Carvel with privilege of re-assignment conditioned upon the faithful performance of all the terms and conditions as hereinbefore

provided. In the event that the Operator has title and is the owner of the premises herein franchised, then and in that event the Operator shall simultaneously herewith execute a conditional lease to Carvel with privilege of re-assignment conditioned upon the faithful performance of all the terms and conditions on the Operator's part to be performed as hereinbefore provided.

29. Not withstanding anything to the contrary hereinbefore mentioned, it is mutually understood and agreed by and between the parties hereto that in the event that because of the economical situation and value of the dollar, Carvel deems it in the interests of all of its Stores to change the Manual of Operation in price, quantity of merchandise to be dispensed in the operation of Carvel Stores, that any uniform change in the operational sales price of the products shall be uniformly increased throughout the operation of all Carvel Stores.

30. (a) It is mutually understood and agreed by and between the parties hereto that in the event that the Operator does not operate a "B" Unit Building at the inception of this Franchise Agreement in accordance with Carvel's standard of a "B" Unit Building and Equipment, that in such event, if the gross sales in the operation of the Carvel Dari-Freeze Store herein franchised shall exceed $45,000.00 in any one year of the term of this Franchise Agreement, then and in that event the Operator agrees to install such additional Carvel equipment as is required in a "B" Unit Building in accordance with Carvel's established units, at the Operator's own cost and expense. All the provisions of this Contract shall apply to such "B" Unit Building with the same force and effect as if herein originally provided. The provisions of this paragraph is part of the consideration of the granting of the Franchise and License Agreement at the premises hereinbefore mentioned.

(b) In accordance with the preceding paragraph, in the event the gross sales of the Carvel Store herein franchised shall exceed $60,000.00 in any one year of the term of this Franchise Agreement, then and in that event the Operator agrees to reconstruct the Carvel Store building on the

premises so as to comply and conform to size and structure of an "A" Unit Carvel Dari-Freeze Store Building and to install such additional Carvel equipment as is required in an "A" Unit Building in accordance with Carvel's established unit, at the operator's own cost and expense. All the provisions in paragraph 30 (a) shall also apply to this subdivision in the same force and effect as if herein restated.

31. This Contract shall be binding upon the heirs, executors, successors and assigns of the parties hereto.

IN WITNESS WHEREOF, the parties have caused their names and seals to be hereunto affixed, and the corporate parties have caused their names to be hereunto affixed by their proper officers by order of their Board of Directors, the day and year first above written.

CARVEL DARI-FREEZE STORES, INC.

By: MELVIN M. GREENE
Title: President

(Seal)

/s/ SHIRLEY SCHWARTZ
Operator

/s/ BERNARD SUSSER
Operator

Witnesseth:

/s/ DARROW C. NUTT

CUSTOMER'S COPY

EXHIBIT
U. S. Dist. Court
S. D. of N. Y.
MAR 15 1962

SALES CONTRACT

Carvel

STORES OF NEW YORK, INC.

SC 20113

GENERAL OFFICES
80 WOODWORTH AVENUE
YONKERS, NEW YORK
YOnkers 9-7200

Purchaser Paul & Gertrude Giberman Date Sept.27,1955

Address R. D. #2, Howell Township, New Jersey

Store #256

Ship To Rte. #413, Near Plumridge Pass, Bristol Township, Penna. Ship Via Truck

Net F.O.B.

Cash With Order $5,000.00 Balance $ 8,990.00 C.O.D. Terms: Yonkers, N.Y.

QUAN.	DESCRIPTION	Unit Price	Extension	
2	C-56 Freezers with self contained compressors, custom made complete with mirror, S.S. draw buckets & S.S. flavor sign holders #6000	3691.00	7382	00
1	300 Cal. Mix Storage Box 6x6x6½ with compressor & blower combination #6007	1280.00	1280	00
1	Carvel Fountain Display Cabinet with Service Bar containing 2 cream pails, 1 chocolate pump-square base, 5 syrup wells-fruit, 5 syrup well covers-fruit, 1 syrup well-chocolate, 5 S.S. ladles (1½ oz) complete with superstructure #6062	1260.00	1260	00
2	S. S. Ladles (4 oz.) #6015	1.90	3	80
1	Refrigerated Water Drin. Fountain #6004	216.00	216	00
2	S. S. Pails (1½ qt.) #6008	15.30	30	60
1	Multi-mixer, electric 5 spindle with 1 rinsing cup complete #6010	123.40	123	40
1	Malt Dispenser #6012	20.50	20	50
1	Fudge warmer, electric, 110 V., with 1 custom made shelf, complete #6013	22.50	22	50
2	Rubbish burners #6017	6.75	13	50
2	S. S. Scoops #6018	3.50	7	00
1	Refrigerated Front Display Counter with Sun [illegible] custom made, complete #6006B	PLAINTIFF'S EXHIBIT 1800.00	1800	00
1	Sign holder, plastic (set) #6063	1.00	1	00
1	Carvel Electric clock, 110 V., custom made #[illegible]	U.S. Dist. Court 12.75	12	75
1	Hot Plate, electric, 110 V., 2 control #60[illegible]	S.D. of N.Y. 7.00	7	00
1	Wire Whip, S. S. #6091	DEC 18 1961 2.50	2	50
1	Milk Stirrer, zinc #6084	1.10	1	10
1	Overflow brush #6060A	.75		75
1	Barrel brush #6060	2.95	2	95
1	Decorating syringe with attachments complete #6092	2.50	2	50
2	Flavor boards #7114	14.25	28	50
2	Measuring cups #6071	.09		18

Cash With Order $ 2,000.00 Balance $ 9,990.00 C.O.D. Terms: Yonkers, N.Y.

QUAN.	DESCRIPTION	Unit Price	Extension	
2	C-56 Freezers with self contained compressors, custom made complete with mirror, S.S. draw buckets & S.S. flavor sign holders #6000	3691.00	7382	00
1	300 Gal. Mix Storage Box 6x6x6½ with compressor & blower combination #6007	1280.00	1280	00
1	Carvel Fountain Display Cabinet with Service Bar containing 2 cream pails, 1 chocolate pump-square base, 5 syrup wells-fruit, 5 syrup well covers-fruit, 1 syrup well-chocolate, 5 S.S. ladles (1½ oz) complete with superstructure #6062	1260.00	1260	00
2	S. S. Ladles (4 oz.) #6015	1.90	3	80
1	Refrigerated Water Drin. Fountain #6004	216.00	216	00
2	S. S. Pails (1½ qt.) #6008	15.30	30	60
1	Multi-mixer, electric 5 spindle with 1 rinsing cup complete #6010	123.40	123	40
1	Malt Dispenser #6012	20.50	20	50
1	Fudge warmer, electric, 110 V., with 1 custom made shell, complete #6013	22.50	22	50
2	Rubbish-berners #6017	6.75	13	50
2	S. S. Scoops #6018	3.50	7	00
1	Refrigerated Front Display Counter with Sun Glass custom made, complete #6006B	1800.00	1800	00
1	Sign holder, plastic (set) #6063	1.00	1	00
1	Carvel Electric clock, 110 V., custom made #6117	12.75	12	75
1	Hot Plate, electric, 110 V., 2 control #6005	7.00	7	00
1	Wire Whip, S. S. #6091	2.50	2	50
1	Milk Stirrer, zinc #6084	1.10	1	10
1	Overflow brush #6060A	.75		75
1	Barrel brush #6060	2.95	2	95
1	Decorating syringe with attachments complete #6092	2.50	2	50
2	Flavor boards #7114	14.25	28	50
2	Measuring cups #6071	.09		18
4	Torpedo Receptacles #6014	18.75	75	00
1	National Cash Register	330.00	330	00
	Installation and testing of refrigeration equipment; location engineering report and business potential survey for property; use of original Carvel blueprints and Carvel specifications; construction and engineering checks of building progress, plot plans, etc; delivery of sign and advertising equipment on loan by others; use and services of Carvel Training Units; general supervision of opening of store and business; advertising display package including opening dry and promotional advertising.		1366	47
		TOTAL PRICE	$13,990	00

"All above equipment warranteed and serviced for one year."

SEE TERMS AND CONDITIONS ON REVERSE SIDE

PLAINTIFF'S EXHIBIT #21 U.S. Dist. Court S.D. of N.Y. DEC 18 1981 E-16

289-A

CONDITIONS IN AGREEMENT OF SALE
APPLYING TO SALE OF ANY FREEZER

The sale of a freezer is subject to the following agreements:

If Carvel sells a freezer unit to the buyer, it is agreed that Carvel does at no time sell to the buyer the front assembly plate bearing Carvel's trade-mark and consisting of Front Plate identified as Part No. 5-D, Valve identified as Part No. 5-D-1 and Decorative Tip identified as Part No. 5-D-2.

The foregoing signs and insignia and the use thereof, serve to indicate to the public that the store sells Carvel frozen dairy products, and the front assembly plate provides a swirl of the product which is characteristic of Carvel products. Title to all these parts separately mentioned shall at all times remain in Carvel and shall not be included in the sale. Carvel will permit the buyer to use such parts only so long as the buyer fully complies with all the terms and conditions of the Carvel Dealer's Franchise Agreement. On termination of such agreement or violation thereof, Carvel shall have the absolute right to retake such parts at any time or to require their immediate return. In furtherance of the foregoing, Carvel may take all appropriate action, including but not limited to the right to enter the buyer's premises and remove the aforesaid parts, using no more force than reasonably necessary, without liability for trespass, waste or otherwise. In such event, the buyer shall have the right to request Carvel, and Carvel will within ten (10) days after the receipt of notice from the buyer, supply to the buyer a front assembly plate without Carvel's insignia and with an attachment that will produce a ribbon ejection of the product and not a swirl. The buyer agrees to pay Carvel therefor, on delivery, at Carvel's cost plus 20%. The buyer shall be obligated to do all work in connection with the attachment of the new front plate to the machine.

In the event of termination of the Carvel Dealer's Franchise Agreement or breach thereof by the buyer, if the buyer fails, within ten (10) days after the date of receipt by the buyer of Carvel's notice of termination of the Dealer's Franchise Agreement, to request Carvel to furnish to the buyer a new front assembly plate as described herein, then Carvel shall have the right to repurchase the aforesaid freezer on the following basis: the initial cost thereof less depreciation of 50% during the first year after purchase and 10% additional for the second year after purchase, and a further sum of 5% for each year thereafter, provided, however, that Carvel shall pay in no event less than 10% of the original purchase price thereof. If the said freezer has not been fully paid for at the time of the exercise of this option, then the indebtedness still outstanding thereon shall be deducted from the re-purchase price, but Carvel will purchase the freezers subject to the buyer's outstanding obligation thereon.

Wherever a lapse of time is specified herein, time shall be of the essence.

Notice of termination by Carvel shall mean notice of termination as is specified in the Dealer's Franchise Agreement.

All equipment, both referred to above and on the reverse side hereof, is sold subject to the condition that all electrical work and plumbing must be furnished by the customer. All commitments of the seller are subject to delay caused by normal manufacturing operations or as prevented by strikes, lockouts, acts of God, acts of the Government, civil or military authorities, material shortages, delays of public carriers, fire, theft, and any cause beyond the seller's control. The seller assumes no responsibility for damage on account thereof. Items listed remain the property of the seller until fully paid.

All warranties and guarantees are extended to purchaser as received by Carvel from manufacturers of motors, compressors and other such equipment.

Should any part or parts of this machine, during the period of one year from date of purchase, be proven to the satisfaction of Carvel to be defective, Carvel does hereby guarantee to replace free of charge, F.O.B. Yonkers, N. Y., any such part or parts of equipment designated herein (ordinary wear, accident and misuse excepted), but such guarantee shall be null and void where such part or parts or labor required, are not procurable by reason of Acts of the U.S. Government or subdivisions or agencies thereof. Carvel shall not be liable for repairs or replacements made by buyer without its written consent, nor for damage, delays and losses, consequential or otherwise, caused by defects, its liability being expressly limited to replacement parts.

Carvel reserves the right to change or revise its standards in connection with any feature of its product with the idea of improving its freezers from time to time as in its judgment may be necessary or advisable. In case of such changes of standards, neither Carvel, nor its distributors or dealers, shall be obligated to make corresponding changes, improvements, additions or replacements to care for equipment previously sold or shipped.

Carvel reserves the right to change or revise prices on any of its models except as set forth in this contract.

Purchaser acknowledges receipt of a full, true and correct copy of this contract.

Should any of the equipment of this contract be financed, the purchaser agrees to furnish the finance company with a fire insurance policy with extended coverage, including vandalism, upon delivery of said equipment.

CARVEL STORES OF NEW YORK, INC.

By _____
Vice President

Witness _____

Witness _____

Witness _____

_____
Buyer

_____
Buyer

PLAINTIFFS' EXHIBIT 6

SIGNS AND SPECIAL EQUIPMENT LEASE

AGREEMENT made this 17th day of March 1956, by and between CARVEL CORPORATION, a New York Corporation with offices at 80 Woodworth Avenue, Yonkers, New York, hereinafter designated as Lessor, and Matthew & Jane L. Seu, 23 Park Hill Rd., Bristol, Conn. as Lessee.

WHEREAS, the Lessee has on even date herewith, obtained the assignment of lease for premises located at Park St. near Dutton Ave., Bristol, Conn. for the erection, operation and maintenance of a CARVEL STORE; and

WHEREAS, as part of this lease and for the use of the premises as a CARVEL STORE in accordance with building plans and specifications as provided in said lease, the Lessee is desirous of obtaining the use of certain building signs and special equipment adaptable to and used in the business of a CARVEL STORE and for advertising the store as such.

NOW THEREFORE, in consideration of the mutual covenants herein contained, it is mutually agreed as follows:

1. The Lessor does hereby lease and rent unto the Lessee and the Lessee does hereby hire, lease and take from the Lessor, certain signs and special equipment more particularly hereinafter described as follows:

2 Front (Freezer) Assembly Plate, Pat. #D-1674433 identified as:

2 Front Plate, Part #5-D;

2 Valve, Part #5-D-1;

2 Decorator Tip, Part #5-D-2;

Carvel Custom Made Metal Building Signs, neonized, 12 feet in length, complete with Transformers, number of signs—two (2).

One Roof Crown and Cone complete with all parts, ready for installation.

One illuminated highway crown and cone assembly. Pat. #D-168,828.

for use of such signs and special equipment at premises located at Park St. near Dutton Ave., Bristol, Conn. in the operation of a CARVEL STORE in accordance with the use of such signs and special equipment as indicated in the building plans and specifications of said building and in furtherance of the operation of the CARVEL STORE by the LESSEE herein.

Title to the property herein above described shall be and always remain the property of the Lessor herein.

This lease is conditioned upon the Lessee faithfully complying with all the terms, covenants and conditions on said Lessee's part to be performed of the Lease for said premises. Or in the event that the terms of the lease under which the Lessee occupies the premises located as herein above described are breached by the Lessee, this lease shall come to an end and be terminated.

The term of this lease shall be for such period of time as the Lessee shall maintain and operate a CARVEL STORE on the premises.

As compensation for the hiring, use and renting of the signs and special equipment hereinbefore mentioned, the Lessee agrees to pay unto the Lessor the sum of $12.00 as annual rental payable in advance on August 1st of each year.

The Lessee further agrees as consideration for the leasing herein of said personalty that said Lessee will keep all the equipment herein described, in the state of good repair and in workable order including all bulbs, neon tubes, electrical parts and mechanism of same, ordinary wear and tear accepted and shall insure said personalty for damage or loss by fire, with extended coverage, to its full replacement value in the name of the Lessee and the Lessor payable as their interest may appear. The Lessee agrees that during the term of rental, not to mortgage, pledge or

encumber any of the signs and special equipment herein letted during the term of rental and upon termination of the lease for the premises to re-deliver the personalty herein rented to the Lessor herein in a state of good repair, ordinary wear and tear accepted.

The Lessee agrees to provide at his own expense Public Liability Insurance with limits of $100/300,000.00, including Property Damage Insurance of $2,500.00 covering the use of the leased equipment which insurance shall be issued in the name of the Lessee and the Lessor as their interest may appear; which insurance policies or certificates thereof will be delivered to the Lessor and agrees to hold the Lessor free and harmless of any and all claims, damages, suits as may arise from the use of said equipment at the premises herein described during the entire term of this lease.

The Lessee agrees at his own cost and expense to erect and install said signs and special equipment suitably and prominently on the premises hereinbefore described, at all times that the premises are used as a CARVEL STORE, and to supply all necessary permits for same.

NOTWITHSTANDING ANYTHING TO THE CONTRARY HEREINBEFORE MENTIONED, the Lessor shall have the absolute right for any reason whatever to cancel and terminate this Lease upon giving the Lessee thirty (30) days notice in writing to that effect and upon expiration date as fixed in said notice, the signs and special equipment leased herein shall be returned to the Lessor in a state of good repair, subject to ordinary wear and tear.

IN WITNESS WHEREOF, the corporate party has caused its name and seal to be duly affixed hereto by its proper officer by order of its Board of Directors and the individual party(s) have caused his/their name(s) to be hereunto affixed, the day and year first above written.

/s/ JANE L. SEU
Dealer

/s/ MATHEW SEU
Dealer

Dealer

CARVEL CORPORATION

By: /s/ RICHARD A. CEROSKY
Title Assistant Secretary

(Seal)

PLAINTIFFS' EXHIBIT 7

CONDITIONAL REASSIGNMENT OF LEASE

AGREEMENT made this 29th day of October, 1955, by and between CARVEL STORES REALTY CORP., a corporation organized and existing under the laws of the State of New York, with offices at No. 80 Woodworth Avenue, Yonkers, N. Y. (hereinafter referred to as "Realty"), and Joseph F. Phelan of 41 Cedar Rd., Malverne, N. Y. (hereinafter referred to as the "Dealer"),

WITNESSETH:

WHEREAS, the Dealer is a duly authorized franchise dealer of Carvel Stores of New York, Inc. (hereinafter referred to as "Carvel") by agreement of even date herewith, which agreement is hereinafter referred to as the "Franchise Agreement"; and

WHEREAS, Realty, as Tenant, and The Second Center Street Corporation as Landlord (hereinafter referred to as the "Landlord") have entered into a certain lease on the 29th day of October, 1955, pertaining to premises located at Corner Center St. & Victoria Rd., Manchester, Conn. for the erection, maintenance and operation of a Carvel Store for the retail sale of Carvel's Frozen Dairy Product; and

WHEREAS, The Dealer has heretofore requested the assignment of the said lease, and Realty thereupon duly assigned the same to the Dealer for the erection, maintenance and operation of a Carvel Store; and

WHEREAS, Realty has a valuable interest in the continued use of said premises for a Carvel Store; and

WHEREAS, the parties agree that it is desirable to effect a reassignment of the said lease to Realty upon the happening of certain events hereinafter more fully set forth;

NOW, THEREFORE, in consideration of these premises and the mutal covenants and conditions herein contained, it is mutually agreed as follows:

1. The Dealer hereby assigns, transfers and conveys unto Realty all of his right, title and interest in and to that certain lease dated the 29th day of October, 1955, made and entered into between the Landlord aforesaid and Realty, and pertaining to the premises aforesaid, as more particularly described in the copy of the said lease attached hereto, which lease was duly assigned on even date herewith by Realty to the Dealer, and assumed by the Dealer; PROVIDED, HOWEVER, that this reassignment, retransfer and reconveyance of the said lease from the Dealer to Realty is conditional only, and shall become effective only, upon the happening of one of the events specified in subparagraphs (a) or (b) or (c) below, and the fulfillment of the conditions specified in subparagraph (d) below:

(a) That the Dealer shall breach any of the terms and conditions of the said lease, and shall fail to cure such breach after written notice thereof from the Landlord or Realty within a period of fifteen (15) days.

(b) That Carvel has made claim that the Dealer has broken any of the terms and conditions of the Dealer's Franchise Agreement hereinabove referred to, and that Carvel shall have sent notice to the Dealer by the terms of which Carvel has terminated the Franchise Agreement.

(c) That the Dealer, under the said lease, shall have an option to renew the same for an additional term, but shall have failed to do so, within the specified time.

(d) That Realty shall have made this assignment operative by notifying the Dealer, as well as the Landlord, and by delivering to the Landlord an executed copy of this instrument, together with an assumption of the term of the said lease by Realty, substantially in the form of the assumption agreement attached hereto. The notice to the Dealer shall be in writing, addressed to the Dealer at the address hereinabove set forth, and a copy thereof shall be given to the Landlord who shall have no responsibility in connection with the mailing or the giving of such notice. Upon deposit of an executed copy of this assignment with the Landlord, together with the assumption agreement, it shall be conclusively presumed that the Dealer is no longer entitled to the right to use or occupy the premises, that all of the Dealer's rights under and pursuant to the assignment of lease to the Dealer have in all respects terminated and by the terms of this agreement are reassigned to Realty. The Landlord shall not inquire further into the matter. The Dealer hereby requests the Landlord to act in accordance with the terms of this paragraph and agrees that he will hold the Landlord harmless from any claim in connection with the Landlord's action herein, and agrees that he will under no circumstances make any claim of any nature against said Landlord for relying upon and acting in accordance with the terms of this agreement. Realty agrees to indemnify and hold the Landlord harmless from any and all liability arising out of the Landlord's actions in accordance with the terms of this paragraph.

2. In the event that Realty makes this document effective as a reassignment in the manner aforesaid, Realty agrees to pay to the Dealer as compensation for Dealer's expenses in connection with the erection of the Carvel Store on the said premises, the following:

(a) If this reassignment becomes effective during the original term of the said lease, a sum equal to 7½% of the Dealer's total investment in the said building, as the term is hereinafter defined, times the number of years remaining under the said lease, but without regard to the terms remaining under an option to renew the lease for an additional term, if any.

(b) If this reassignment becomes effective during any renewal term of said lease, upon exercise by the Dealer of the option to renew, a sum equal to 25% of the Dealer's "total investment" in the said building.

(c) By the "Dealer's total investment" in the said building, the parties mean the total amount of money that the Dealer has actually expended, and as he shall substantiate by paid bills for labor, materials and contractors' construction charges in connection with the actual original construction of the Carvel Store, plus such expenses as the Dealer may have had for black topping the premises, less a 5% depreciation annually from the date when the premises were first occupied as a Carvel Store. The investment as hereinabove defined, shall not include any costs in connection with the equipment thereon or maintenance expenses.

(d) The applicable payment aforesaid shall be made in monthly installments. It is agreed, however, that no payment shall be due for any period during which the said premises are not used as a Carvel Store nor for other business purposes, and the total indebtedness of Realty hereunder shall be accordingly reduced.*

3. In the event that Realty effects the reassignment of the said lease in the manner aforesaid, then it shall have the right, but not the obligation, of purchasing all of the Dealer's right, title and interest in and to any or all of the personal property then located on the premises aforesaid, including machinery, equipment and trade fixtures and other fixtures, upon the following terms and conditions:

(a) That the purchase price for any of the said personal property selected by Realty for purchase shall be fixed at the initial cost to the Dealer herein, (as substantiated by paid bills) less depreciation as follows: 50% during the first year after purchase, an additional 10% for the second year, and an additional 5% for each following year, provided, however, that in any event there shall be paid no less than 10% of the original purchase price to the Dealer. If any

* Said monthly installments shall be paid over the remaining period of Lease. First Payment to commence two (2) months from the date of the retaking of the premises by Realty and continue monthly thereafter until fully paid.

of the said machinery and equipment have not been fully paid for at the time of the exercise of this option, then the indebtedness still outstanding thereon shall be deducted from the purchase price, but Carvel will purchase the freezers subject to the Dealer's outstanding obligation thereon.

(b) Notice of Realty's intention to exercise its option to purchase aforesaid shall be given in writing to the Dealer within a reasonable time, specifying the items of equipment that Realty desires to purchase, and payment therefor shall be made by Realty to the Dealer at Realty's office above set forth no later than ten (10) days after the said notice. Simultaneously with payment, the Dealer shall deliver to Realty a bill of sale, endorsement of the guarantees on machinery and equipment, if any, and any and all other documents appropriate in connection with such sale. Realty shall not be required to make any payment therefore, unless proper documents as aforesaid are delivered to Realty in form reasonably satisfactory to Realty.

4. This agreement shall be binding upon and inure to the benefit of the parties and their respective heirs, executors, administrators, successors and assigns.

5. This agreement constitutes the entire agreement of the parties. It cannot be changed or terminated orally. It shall be deemed to have been made in the State of New York and shall be construed in accordance with the laws of the State of New York.

IN WITNESS WHEREOF, the parties have caused their hands and seals to be hereunto affixed, and the corporate party has caused its name to be hereunto affixed by its duly authorized officer, and its seal to be hereunto affixed, the day and year first above written.

CARVEL STORES REALTY CORP.

by /s/ RICHARD A. CEROSKY
Vice President

/s/ JOSEPH F. PHELAN
Dealer

PLAINTIFFS' EXHIBIT 7A

ASSIGNMENT OF LEASE AND ASSUMPTION AGREEMENT

AGREEMENT made this 29th day of June, 1955, by and between CARVEL Stores Realty Corp. a domestic corporation of the State of New York, having its offices at 80 Woodworth Avenue, Yonkers, New York, hereinafter designated as "Assignor," and Paul and Gertrude Giberman R. D. #2 of Howell Township, Monmouth County, New Jersey hereinafter designated as the "Assignee"

WHEREAS, the Assignor is the present Lessee of certain premises located at N. J. State Highway, Route #9 & Fort Plains Road, Howell Township, N. J., which premises has been leased for the establishment, maintenance and operation of a CARVEL STORE for the sale of Carvel frozen products and;

WHEREAS, the Assignee herein is desirous of obtaining from the Assignor the assignment of said lease under certain terms and conditions:

WHEREAS, the Assignee represents that he has made arrangements for a Dealers Franchise Agreement with CARVEL STORES of New York, Inc. authorizing the establishment, operation, and maintenance of a CARVEL STORE for the retail sale of Carvel frozen dairy products and is an authorized dealer of Carvel

NOW THEREFORE, in consideration of the mutual covenants hereinafter contained, it is mutually agreed as follows:

1. The Assignor herein does hereby assign, transfer and convey unto the Assignee, all its right, title and interest in and to a certain Lease for the balance of the term therein stated, which Lease is dated the 29th day of June, 1955, and was entered into between Paul and Gertrude Giberman as the Lessor and the Assignor herein as Lessee, cover-

ing premises situated and mentioned in said Lease, copy of which lease is annexed hereto and made a part hereof as if herein at length set forth.

2. The Assignee does hereby accept the assignment of said Lease and does hereby assume and agrees to keep, observe and perform all the terms, covenants, and conditions of the Lease hereby assigned; on the part of the lessee therein mentioned to be performed for the balance of the term hereof and upon the terms and conditions therein contained on the part of the Lessee therein mentioned to be performed, and agrees to be and become liable for the non-performance of the terms assumed.

3. The Assignee further agrees to execute and deliver any and all documents as may be required to effect the assignment of said lease and the assumption by the Assignee of the terms hereof.

4. The Assignee further agrees to execute simultaneously with the execution of this assignment, a conditional reassignment of said lease, to Assignor herein of 80 Woodworth Avenue, Yonkers, New York, conditioned upon the faithful performance by the Assignee of all the terms, covenants and conditions of said lease and further conditioned upon the faithful performance by the Assignee of all the terms, conditions and provisions of a certain Dealers Agreement for the operation of a Carvel Store entered into between the Assignee as the dealer and CARVEL STORES of New York, Inc., as the principle, dated the 29th day of June 1955.

5. This agreement is binding upon and shall inure to the benefit of the successors, heirs, assigns and executors of the parties hereto.

IN WITNESS WHEREOF, CARVEL Stores Realty Corp. has caused its name and seal to be hereunto affixed by its proper officer by officer by direction of its Board of Directors and the Assignee has caused its/their name and seal to be properly affixed hereto, the day and year first above written.

CARVEL STORES REALTY CORP.

By: /s/ GEORGE P. CLARK
Vice President

/s/ PAUL S. GIBERMAN
Assignee

/s/ GERTRUDE GIBERMAN
Assignee

PLAINTIFFS' EXHIBIT 10

AGREEMENT, made this 14th day of May 1956, by and between Carvel Stores of New York, Inc. a corporation of the State of New York, with offices at 80 Woodworth Avenue, Yonkers, New York, (hereinafter referred to as "Carvel"), and H. P. Hood & Sons, Inc., a corporation of the State of Massachusetts, with principal offices at 500 Rutherford Avenue in the City of Boston, State of Massachusetts (hereinafter referred to as "Processor").

WITNESSETH:

WHEREAS, Carvel has perfected and is the owner of a certain secret formula for the manufacture of ice cream mix used in the production of Carvel Ice Cream which is sold exclusively at Carvel Dari-Freeze Stores, (said mix being hereinafter referred to as "Carvel Mix"); and

WHEREAS, it is the desire of the parties hereto that the Processor manufacture Carvel Mix and sell the same only to Carvel, and deliver said Carvel Mix to the Carvel Dari-Freeze Stores (hereinafter referred to as "Carvel Stores") in the area hereinafter described, upon the terms and conditions hereinafter set forth; and

WHEREAS, the Processor acknowledges that the said secret formula is of substantial value, and is the property of Carvel, and that the terms, conditions and covenants hereinafter contained are equitable and necessary for the protection of the said secret formula, and to insure the

uniform quality and appearance of Carvel's Frozen Dairy Product made from said Carvel Mix;

NOW, THEREFORE, in consideration of the foregoing recitals and of the mutual covenants hereinafter contained, it is agreed as follows:

Manufacture of Carvel Mix

1. The Processor agrees to manufacture as much Carvel Mix as may be required by the various Carvel dealers located in the area set forth in Appendix A (hereinafter referred to as "Area") for the operation of their respective Carvel Stores, and sell the same to Carvel, and Carvel hereby agrees to purchase all its requirements of Carvel Mix in said Area only from the Processor.

Secret Formula

2. The Processor shall manufacture the Carvel Mix in accordance with the secret formula which shall be furnished to the Processor by Carvel on or prior to the execution of this agreement. Said formula shall be initialed by both parties and kept in a safe place, so that it shall not be disclosed to any but authorized employees of the Processor and Carvel. Said Carvel Mix shall be manufactured at the Processor's Plants at Boston, Massachusetts and New Haven, Connecticut and in no other place.

Ingredients; Batch Reports

3. In connection with the manufacture of Carvel Mix, the Processor shall comply with the following, among other conditions.

INGREDIENT DELETED

(b) For the other ingredients set forth in the formula, only materials of the highest quality shall be used. Carvel Mix, when packed in ten (10) gallon cans, shall have a minimum weight of 92 pounds (exclusive of the weight of the can).

(c) For the State of Massachusetts and Connecticut the Carvel Mix shall have at least a ten (10%) percent butter fat content.

(d) The Processor shall strictly observe all requirements of all Federal, State and local laws and regulations pertaining to the manufacture or delivery of ice cream mix, effective in the respective areas in which the Carvel Mix shall be delivered or manufactured by the Processor in accordance with this agreement.

(e) The Processor shall manufacture the Carvel Mix in batches. After the completion of each batch, a batch report shall be promptly prepared, at the cost and expense of the Processor, by a duly licensed analyzing chemist. A copy of the batch report shall be mailed to Carvel within twenty-four (24) hours after the preparation of each batch.

Packing and Labeling of Carvel Mix

4. (a) The Carvel Mix shall be packed in sanitary ten (10) gallon cans, free and clean of any rust spots. All such cans shall be wired and sealed on both handles of the can, at the Processor's plant.

(b) The Carvel Mix shall be labeled at the Processor's plant with the Carvel Special Formula tag which shall bear the date of manufacture. Said tags shall have such inscription as may be from time to time prescribed by Carvel, which tags shall comply with applicable legal requirements.

Delivery of Carvel Mix

5. (a) Carvel Dealers in the Area may transmit orders directly to the Processor for their requirements of Carvel Mix. The Processor shall fill said orders promptly and deliver the same to the respective Carvel Stores as soon as possible.

(b) The Processor shall transport and deliver the Carvel Mix to the respective Carvel Stores, pursuant to orders received as aforesaid, in suitable trucks operated by the Processor,

(c) The Processor shall procure a delivery receipt for each delivery made and send same to Carvel.

(d) Prior to the fifth business day of each month, the Processor shall submit to Carvel, a Statement of the total cans of Carvel Special Formula Mix delivered to each store during the previous month.

(e) The Processor will not itself represent, or permit any of its employees to represent that the Processor or any of its employees are the representatives of Carvel, and will indemnify and hold Carvel and its affiliates free and harmless from any liability which may be incurred by any act of any such person in violation of the terms of this paragraph;

(f) The Processor agrees that he will deliver only Carvel Mix to Carvel Stores, and no other ice cream mix or ice cream preparation of any kind.

(g) It is understood and agreed that the Processor's obligation to manufacture and supply Carvel Mix, as set forth in this agreement, shall at all times be subject to delays that may be due to strikes, acts of God, official embargoes, or wartime restrictions.

Invoices

6. All Carvel Mix purchased by any Carvel Store shall be sold in the name of Carvel and invoiced by the Processor on Carvel forms directly to the Carvel Stores ordering same, at such price as shall be fixed from time to time by Carvel. The invoices to be used shall be in the form as per sample invoice annexed hereto, or on such other forms as may hereafter be specified by Carvel, and shall be printed at the expense of Carvel. The original invoice shall be delivered to each Carvel Store at the time of delivery of the Carvel Mix and the duplicate and triplicate copies of the invoice shall be mailed directly to Carvel at 80 Woodworth Avenue, Yonkers, New York.

Credit and Collection

7. (a) The first shipment of Carvel Mix to any one of the Carvel Stores shall be on open account. On the second shipment of Carvel Mix to any one of the Carvel Stores, the Processor shall, on behalf of Carvel, collect

the purchase price for the said first shipment, payable by the respective Carvel dealer, and on all subsequent shipments, the Processor shall collect payment for the preceding shipment; it being intended that at no time shall the Processor make any additional shipment of Carvel Mix until the previous shipment has been paid for.

(b) The maximum amount of Carvel Mix which may be delivered to any one Carvel Store during any one week on open account, chargeable to Carvel, shall be in the sum of $500.00, except if otherwise authorized in writing by Carvel. The Processor shall notify Carvel of any delinquency in payment on the part of any Carvel Store. The Processor shall, if requested by Carvel, make shipments on a C.O.D. basis only, to such of the Carvel Stores as may be designated by it.

(c) Upon request of Carvel, the Processor shall also, without additional expense to Carvel, collect any royalties on Carvel Mix due to Carvel from the Carvel Stores.

(d) All collections shall be deposited by the Processor in a special bank account to be opened in the name of Carvel, in a bank approved by it, on which account only Carvel and an authorized executive officer of the Processor shall be authorized to withdraw funds. All checks shall be endorsed with a rubber stamp to be furnished by Carvel showing the endorsement to be solely for the purpose of deposit in said account. A copy of each deposit slip shall be mailed to Carvel as soon as each deposit is made, together with a schedule, setting forth the collections covered by said deposit, including list of Carvel Stores, quantities, dates of shipment, and invoice number.

Price

8. (a) The price to be paid to the Processor for manufacturing the Carvel Mix shall be

(1) the actual cost to it of all ingredients prescribed in the formula used in the manufacture of the Carvel Mix, plus

(2) 17½% thereof to cover its labor, overhead and profit.

(b) The price to be paid to the Processor for delivery of Carvel Mix to Carvel Stores, billing, collections of Payment, maintenance of insurance and all other services to be rendered by the Processor hereunder shall be the sum of $.50 per 10 gallon can of Carvel Mix actually delivered as aforesaid.

(c) Bills shall be rendered weekly for all shipments made during the prior week. Said price, computed as aforesaid, shall be the fixed price until changed as hereinafter provided.

(d) A certificate of an executive officer of the Processor, certifying to the actual cost of the ingredients prescribed in the formula, shall be furnished to Carvel on the tenth day of each month. If the cost price of the ingredients used in the manufacture of the Carvel Mix has either increased or decreased as at the tenth day of any month, the price to be charged to Carvel for manufacturing Carvel Mix shall be adjusted accordingly. Notice of such price change shall be sent to Carvel on the tenth day of such month, and shall become effective on the fifteenth day of such month, it being the intention of the parties that the price shall remain fixed for periods of at least one month (that is, from the 15th day of any month to the 15th day of the following month), and thereafter until changed in accordance with the procedure hereinabove set forth.

Insurance

(a) The Processor agrees to indemnify Carvel against all damages, arising out of the sole negligence of the Processor, its agents or servants, in the operation of Processor's trucks while delivering Carvel Special Formula Mix, up to $100,000. for personal injuries and/or death sustained by any one person; and subject to the foregoing limitation, up to $300,000. for personal injuries and/or death sustained in any one accident by two or more persons; and up to $100,000. for any property damage.

The foregoing notwithstanding, it is understood and agreed between the parties that this indemnity provision does not apply to the areas covered by the below described policies of insurance which the Processor agrees to keep

in force during the entire term of this agreement at its own cost and expense.

(1) Automobile Liability insurance carried with Hardware Mutual Casualty Company with limits of $5,000. for personal injuries and/or death sustained by any one person and subject to this limitation up to $10,000. for personal injuries and/or death sustained in any one accident by two or more persons and $5,000. for property damage.

(2) Automobile Liability excess insurance carried with Lloyds in the amount of $1,000,000. subject to $100,000. deductible.

The Processor further agrees to indemnify Carvel with respect to any damage for personal injury and/or death sustained by any one person up to $100,000.; and subject to the foregoing limitation, with respect to personal injuries and/or death sustained by two or more persons in any one occurrence up to the sum of $300,000. resulting from a defect in any shipment of said mix existing at the time the merchandise is delivered by Hood to a store.

This paragraph is subject to the following conditions:

1. That we be notified by your company within a reasonable time of the existence of a claim that may give rise to any such damage.
2. That no settlement on a claim for any such damage shall be made without our prior consent.
3. That the negligence or other fault of any agent, servant or employee of your company is not a cause of the injury.
4. It may terminate on seven (7) days' written notice from Hood.

The foregoing notwithstanding, it is understood and agreed between the parties that this indemnity provision does not apply to the areas covered by the below described policies of insurance which the Processor agrees to keep in force during the entire term of this agreement at its own cost and expense.

(1) Products Liability insurance with Vendors coverage carried with Lloyds of London and American Universal Insurance Company with the following limits.

(a) $50,000 subject to a $10,000 deductible for personal injuries and/or death sustained by any one person and

(b) $5,000,000 for any one occurrence involving more than one person, with $200,000 deductible subject to an aggregate total for policy year of $5,200,000 with a $200,000 deductible.

Inspection

10. Authorized employees of Carvel shall have the right (but not the obligation), at any and all reasonable business hours of the day, to enter and inspect the plant of the Processor manufacturing Carvel Mix and the distributing depots of the Processor, if any, and shall also have the right (but not the obligation) to inspect all materials, machines and equipment used in conjunction with the manufacture of the Carvel Mix, wherever located. The Processor shall follow all reasonable recommendations which Carvel may make regarding the manufacture of Carvel mix.

Unsatisfactory Mix

11. Carvel may return any Carvel Mix delivered in unsanitary cans or any mix that, in its reasonable opinion of authorized personnel, does not conform to the formula for Carvel Mix herein referred to, or in the manufacture of which materials of inferior quality have been used. Carvel may refuse to accept further deliveries until the Processor has demonstrated to Carvel that it has taken appropriate action to prevent the reoccurrence of any such deficiency.

Carvel Mix Formula to be Kept Secret

12. The Processor agrees that except as reasonably convenient to produce the product under this agreement

it will not reveal, divulge or make known, or permit to be revealed, divulged or made known either directly or indirectly, the secret Carvel Mix formula or the process, manner of manufacturing, compounding or preparing said Carvel Mix, or any other pertinent knowledge or information concerning the foregoing to any person, firm or corporation during the life of this agreement or at any time after its expiration or earlier termination, excepting only that the Processor may furnish information required by law to such Federal, State, or Local authorities as may be entitled to the same. The Processor further agrees that it will not manufacture, or represent that it can or will manufacture, the Carvel Mix for sale to any person, firm or corporation, other than Carvel or its designated Carvel stores. This clause is to survive the expiration or earlier termination of this agreement. The Processor agrees that, in view of its importance for Carvel's business, Carvel may enforce any violation of this clause by an injunction *pendente lite,* or other equitable proceeding, in addition to any remedy at law.

Term of Agreement

13. (a) The term of this agreement shall be for a period of one (1) year, beginning on the 15th day of May, 1956, provided, however, that either party may cancel and terminate this agreement upon ten (10) days' written notice by registered mail to that effect.

(b) Upon the expiration or earlier termination of this agreement, the Processor

(1) Shall collect any sum due and owing by Carvel dealers for Carvel Mix delivered pursuant to this agreement, and pay the same to the Carvel account in the manner aforesaid.

(2) shall return promptly all invoice forms, delivery receipt forms, tags and any other materials that may belong to Carvel.

(3) shall return the secret formula, and agrees not to make or keep any copies thereof, except as may be

contained in such records as the Processor may be required by law to maintain.

Assignment; Waiver; Notice; Titles; Applicable Law

14. (a) This agreement may not be assigned by the Processor, but may be assigned by Carvel to its successors and assigns.

(b) No provision of this agreement may be waived except in writing. A failure to enforce, or waiver in one particular instance of, any of its provisions shall not be deemed a continuing waiver.

(c) All notices required by this agreement shall be in writing and mailed to the addresses first hereinabove written, unless the respective parties shall otherwise advise.

(d) The titles of the various paragraphs of this agreement are inserted for reference only, and do not define, limit or describe the scope or intent of any of its provisions.

(e) This instrument contains the entire agreement of the parties. It was made in the State of New York, and shall be construed pursuant to the laws thereof. It cannot be changed or terminated orally.

IN WITNESS WHEREOF, the corporate parties hereto have caused their names and seals to be properly affixed by a duly authorized officer the day and year first above written.

H. P. HOOD & SONS, INC.
By /s/ G. H. HOOD, JR. (SEAL)

Witness:

/s/ E. R. MEEKER

Title Treasurer
G. J. D.; R. M. L.

By /s/ FRED VETTEL, JR. (SEAL)

Title Vice Pres.

Witness:

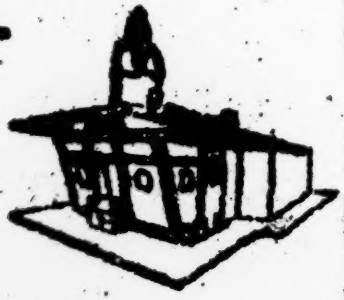
/s/ JAMES GURNEY

EXHIBIT "A"

Stores serviced by H. P. Hood & Sons under Carvel Stores of New York, Inc.

235	Soblen & Lennon	Wethersfield, Conn.
274	Mants	Waterbury, Conn.
285	DeLeone	Waterbury, Conn.
286	Ceriami	Mystic, Conn.
144	Hibbert	Leominster, Mass.

Carvel



99 Wadsworth Ave.,
Yonkers, N. Y.

Yonkers 9-7200

Date _____ No. _____

Carvel Store Number _____
Address _____

	40 Qt. Cans CARVEL MIX @ $		
	Royalty @ $2.50 per 40 gal. can		
	Balance Due -- Previous Delivery		

Total Amount Received $ _____

By _____
Deliveryman

_____ Cans Mix Received

By _____
Signature

Your INVOICE & Delivery Receipt

PLAINTIFFS' EXHIBIT 11

AGREEMENT made this 1st day of May, 1955, by and between CARVEL STORES OF NEW YORK, INC., a Corporation of the State of New York, with offices at 80 Woodworth Avenue, Yonkers, New York, (hereinafter designated as "Carvel"), and EAGLE CONE CORPORATION, a Corporation of the State of New York, with offices at 805 East 140 Street, New York City, New York, (hereinafter designated as "Supplier").

WITNESSETH:

WHEREAS, Carvel supplies the ingredients for Carvel's Frozen Dairy Product to its franchised dealers (hereinafter sometimes referred to as "Carvel Dealers"), for sale and distribution in Carvel Stores, in accordance with Carvel specifications and subject to Carvel's inspection and supervision; and

WHEREAS, Carvel's specifications call for the sale of Carvel's Frozen Dairy Product in various forms and containers, including cones of specified design particularly suitable as receptacles for Carvel's Frozen Dairy Product, and of high quality; and

WHEREAS, a distinct and uniform design of the cones is desirable for the protection of the public which relies, among other factors, on the characteristic appearance of the cones as an additional indication that it is part of Carvel's Frozen Dairy Product; and

WHEREAS, the Supplier is engaged in the manufacture and sale of cones and desires to supply Carvel cones according to Carvel's specifications, and in quantities as ordered by Carvel, subject to the terms and conditions hereinafter set forth,

NOW, THEREFORE, in consideration of the foregoing and of the mutual covenants hereinafter contained, it is mutually agreed as follows:

1. MANUFACTURE OF CONES:

The Supplier agrees to manufacture and sell to Carvel, and Carvel agrees to purchase from the Supplier, from time to time, all of Carvel's requirements of the cones hereinafter described which Carvel shall furnish to all Carvel Stores now located, or hereafter located, in the territory hereinafter set forth, for use in accordance with, and as a part of, Carvel's Frozen Dairy Product.

2. TERRITORY:

The territory mentioned in the foregoing paragraph shall be the following: New York State, Connecticut, Massachusetts.

3. TYPE OF CONES:

The Supplier agrees to furnish hereunder the following types of cones:

(a) a cone of 4¾" height and 2¼" outside diameter on top (commonly known as "10 cent size")

(b) a cone of 4¾" height and 3" outside diameter on top (commonly known as "20 cent size").

4. DESIGN OF CONES; EXCLUSIVENESS:

(a) The Supplier agrees to furnish the said cones in the shape and design indicated on the drawing attached hereto as Schedule A, and made a part of this agreement.

(b) The Supplier agrees to produce cones of the said design only for Carvel, and for no other person.

5. COMPOSITION AND QUALITY OF CONES:

The Supplier agrees to furnish cones made of cake and pastry flour, tapioca flour, sugar, honey, shortening, salt, levening and vanillin, of a quality no less good than the standard quality cones produced by the Supplier at the time of the execution of this agreement, The Supplier represents and warrants that sample cones submitted to Car-

vel before the execution of this agreement, for inspection and testing, are such standard quality cones.

6. INSPECTION:

Carvel will, from time to time, test and inspect the cones for uniformity of appearance and for adherence to the quality standards set forth herein.

7. DELIVERY:

(a) The Supplier agrees to delivery, at its own cost and expense, all orders for cones as promptly as possible, to Carvel, or to designated Carvel Stores within the aforesaid territory. Delivery shall be in accordance with instructions received from Carvel or from persons authorized from time to time by Carvel to give such instructions, including Carvel Dealers.

(b) All deliveries shall be made in suitable corrugated cartons or other packaging, imprinted with Carvel's name and trade mark, in such forms and with such text as Carvel may from time to time prescribe. The cartons or other packaging shall be supplied by the Supplier without additional charge. Carvel shall cooperate with the Supplier by supplying artist's layouts with Carvel's trade mark for the marking of the cartons or other packaging.

(c) The Supplier agrees to take all suitable action to insure that its distributors, routeman, delivery men or other agents and employees shall not represent themselves as agents or employees of Carvel.

8. INVOICES:

(a) The Supplier, at its own expense, shall print Carvel invoice-forms as prescribed by Carvel. A sample of the invoice presently in use is annexed hereto, but Carvel reserves the right to change the invoice-forms from time to time.

(b) The supplier agrees to prepare invoices, on Carvel's invoice forms and in accordance with Carvel's instructions, addressed to the various Carvel Dealers, and to deliver the

same to Carvel Dealers with each delivery of cones to which they refer. The invoices shall list the quantities of cones shipped and the following prices which Carvel charges to the Carvel Dealers:

Small Type Cone—$4.95 per thousand

Large Type Cone—$10.00 per thousand

Carvel may, however, instruct the Supplier, from time to time, to mark different prices than those listed above.

9. BONUS COUPONS:

The Supplier agrees to furnish with each case of cones delivered a printed bonus form in the value of 5% of the invoice price to the Carvel Dealer indicating that the Carvel Dealer receiving the delivery shall be entitled to receive a case of cones without charge upon surrender of the requisite number of bonus coupons. The bonus cases shall be supplied by the Supplier without additional charge either to Carvel or to the Carvel Dealer, it being the intention of the parties that the furnishing of the bonus cases shall be part of the obligations of the Supplier hereunder. The text of the bonus forms shall be as supplied by Carvel from time to time after consultation with the Supplier. Bonus forms shall be printed by the Supplier at its own expense.

10. PRICE:

The Supplier represents that this price is no higher than the average competitive price in the territory described herein at the time of the execution of this agreement. This price shall not be changed during the term of this agreement except as hereinafter set forth.

(b) It is further agreed that the prices set forth in subparagraph A of this paragraph 10 may be reviewed by Carvel at the beginning of every calendar quarter, and if found that the average competitive price charged by the supplier's major competitors' cones of substantially the same size and quality, sold in the Supplier's territory, are lower than the price hereinbefore referred to, then the

Supplier and Carvel agree to reduce the price or prices of either or both cones dealt hereunder to the level of such average competitive price or prices. Such reduced price or prices shall be effective for the following calendar quarter without further change.

(c) It is further agreed that in the event of war or national emergency declared by the President of the United States by proclamation, that the prices referred to in subparagraph A of this paragraph 10 or other prices then currently in effect may be reviewed by the Supplier at the beginning of every calendar quarter during such war or national emergency, and if found that the average competitive price charged by the Supplier's major competitors for cones of substantially the same size and quality, sold in the Supplier's territory are higher than the price or prices hereinbefore referred to, then the Supplier and Carvel agree that the price or prices of either or both cones dealt with hereunder shall be increased to the level of such average competitive price or prices. Such increased price or prices shall be effective for the following calendar quarter without further change.

11. PAYMENT:

Carvel shall pay for the cones as delivered on the 1st day of each and every month, upon statement rendered.

12. DELEGATION OF AUTHORITY TO PLACE ORDERS:

Carvel herewith authorizes the Supplier to accept orders placed by any of the Carvel Stores within the territory described above, provided that the total of such orders at any one time does not exceed $100.00 and the total of such orders within any month does not exceed $500.00. This authority may be revoked or modified by Carvel at any time.

13. INSURANCE:

The Supplier agrees to furnish Carvel with Public Liability Insurance with limits of $100/300,000 and $100,000

on property damage to cover any accident or accidents as may occur in delivery of merchandise and further agrees to furnish Products Liability Insurance with limits of $100/300,000 covering the merchandise manufactured for Carvel and delivered to the Carvel Stores. Copies of the policies shall be furnished to Carvel indicating Carvel and the Supplier as beneficiaries thereunder as their interest may appear.

14. TERM OF THIS AGREEMENT; PURCHASE OF SUPPLIES:

(a) The term of this agreement shall be one year from the date of the making hereof. Thereafter it shall automatically continue from year to year, unless either party shall give written notice to the other of intent to terminate, which notice shall be mailed not later than ninety (90) days before the expiration date of this agreement, or the applicable yearly renewal date.

(b) In the event that this agreement is terminated by Carvel in the manner aforesaid, Carvel agrees to purchase from the Supplier all packaged cones and supplies, imprinted with the Carvel name at the request of Carvel, then on hand including invoice-forms and packaging materials at the Supplier's cost as evidenced by invoices.

15. NOTICES:

All notices or other communications hereunder shall be addressed and sent as follows: To Carvel at the following address: 80 Woodworth Avenue, Yonkers, New York; To the Supplier at the following address: 805 East 140 Street, New York City, New York or to such other address as the parties may from time to time designate in writing.

16. ASSIGNMENT:

This contract cannot be assigned by the Supplier, but may be assigned by Carvel to its successors and assigns

17. CONSTRUCTION OF LAW, ETC.:

This agreement has been executed in the City of New York, New York. It shall be construed pursuant to the laws of the State of New York. It constitutes the entire agreement between the parties and cannot be changed or terminated orally.

IN WITNESS WHEREOF, the parties hereto have caused these presents to be signed and their corporate seals to be hereunto affixed by their duly authorized officers the day and year first above written.

WITNESS

F. VETTEL JR.
MARTIN CAIN

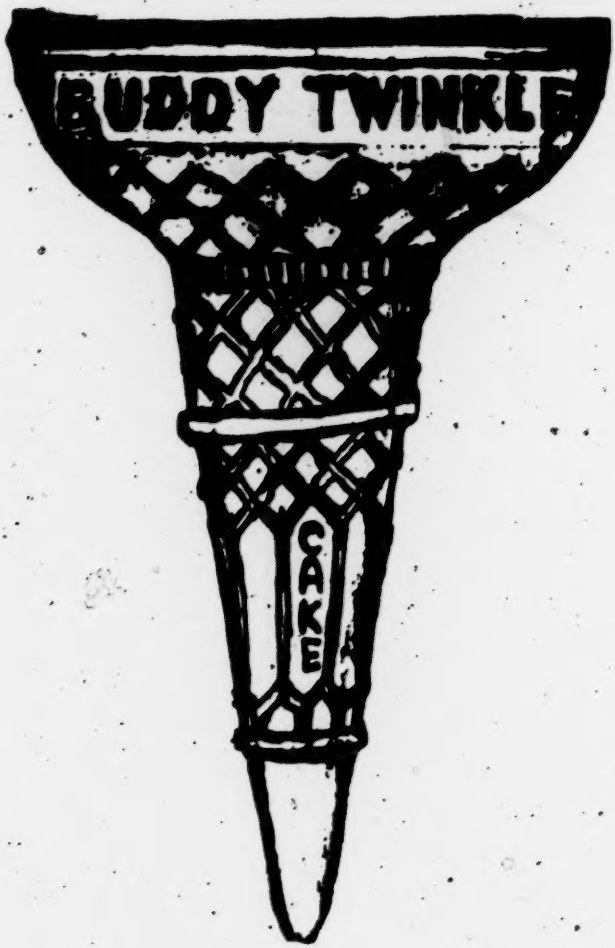
CARVEL STORES OF NEW YORK, INC.

By /s/ ROBERT J. SHALLIN, Secty.

EAGLE CONE CORPORATION

By /s/ ARTHUR X. SHAPIRO

(See Opposite) ☞


BUDDY TWINKLE
CAKE

PLAINTIFFS' EXHIBIT 27

(Letterhead of Carvel Stores of New York, Inc.)

September 3, 1957

Dear Friend:

Recently, several stores increased their prices on many items; five cents on sundaes, etc. Some have increased their ten cent cone to fifteen cents.

While this may give greater return and seems to offer no resistance from the customer, please remember that the person who has only ten cents to spend per child will find a place to spend it. You may not know until it is too late that your business has lost its appeal to children and their parents.

The signs used by some stores to increase prices explained cost increases, etc. and thanked their customers for their patronage. However, some used the Carvel trade mark instead of their own name and franchise license number. This name and trade mark is licensed to you for use only in the sale of ice cream and for no other use. You are paying, through your franchise, a license fee for the use of this name and trade mark in the sale of Carvel approved ice cream and ice cream items only.

To protect our name and trade mark, we must request that you do not reproduce it in any form or use it for any other purposes, as all other rights and licenses are reserved by the trade mark owners.

Our Supply Department has blank signs which may be used should you care to increase or decrease your prices.

Sincerely,

/s/ FRED VETTEL, JR.
Fred Vettel, Jr.

FVJR:ma

[fol. 332]

PLAINTIFFS' EXHIBIT 42

(Letterhead of Carvel Dari-Freeze Stores Inc.)

REPLY TO Advertising Dept.
80 Woodworth Ave.
Yonkers, New York

May 21, 1956

Mr. Paul Giberman
Carvel Store #256
311 Snowball Drive
Levittown, P[illegible]n.

Dear Mr. Giberman:

The writer has been advised by your area supervisor, Mrs. Florence Borrell, that you have been running various special sales recently and doing very well with them. We realize that you are most anxious to promote your store through these various sales and in no way discourage stores from using their own initiative.

However, it is only fair that you check with us prior to your scheduling such events so that other stores in your area could either be advised or given the opportunity to participate in same. In the future would you please send us a schedule of your sales so that we may approve them.

Mrs. Borrell has also advised me that you are having large posters printed to advertise one sale in particular, possibly others. If you have not been so advised, it is not permissible to use signs other than those issued by us and which are available on our advertising materials list. However, should such sales be approved by us, we have available to the stores our standard posters with a blank imprint area for lettering in such sale.

Please bear in mind that as a member of the chain it is not advisable to deviate from its operating procedures.

Thank you for your cooperation in this matter.

Yours very truly,

CARVEL DARI-FREEZE STORES, INC.

/s/ WALTER DIETZE
Walter Dietze
Advertising Manager

WD:mtb

CC: Mrs. Florence Borrell

PLAINTIFFS' EXHIBIT 43

(Letterhead of Carvel Stores of New York, Inc.)

REPLY TO Advertising Dept.

September 8, 1958

Mrs. James Pierce
Carvel Store #243
5245 Rising Sun Avenue
Philadelphia, Pennsylvania

Dear Mrs. Pierce:

In reply to your recent request, please be advised that we do not have signs for Daily Features without recommended prices; however, we do have price change stickers, which are available through the Order Department.

Hope we have been of some assistance to you.

Yours very truly,

CARVEL STORES OF NEW YORK, INC.

/s/ WALTER DIETZE
Walter Dietze
Advertising Manager

WD:mb

PLAINTIFFS' EXHIBIT 44

(Letterhead of Carvel Stores of Pennsylvania, Inc.)

REPLY TO 80 Woodworth Ave.
Yonkers, New York

October 2, 1958

Mr. Sol Rodens
Carvel Store #209
Island & Elmwood Ave.
Philadelphia, Pennsylvania

Dear Mr. Rodens:

We have just received your Supervisor's Report dated September 26, 1958, and were disappointed to note the many discrepancies in the operation of your store.

Your supervisor reports that certain aspects of your business have been allowed to deteriorate. For instance, the sidewalks were not clean, the shrubbery was not in good condition, the road crown and cone is in need of repair, lavatories were not clean, the exterior of your building is in need of painting, the windows and window ledges of your salesroom were not clean, the freezer steps were not clean, the inside of your low temperature cabinet was not clean, the fruit wells were not clean, no garbage cans were provided, all open containers were not covered. We further note that cones, sundaes and banana barges were not being made according to S.O.P. Your freezers were not being properly sterilized; chlorine solution was not being properly prepared and used in order to sterilize utensils; signs were not posted according to S.O.P.; and there were many unapproved signs in use on the front windows of your store.

These are undoubtedly minor deficiencies at the present time; however, we call them to your attention at this time and request your cooperation in correcting them so that they will not develop into the proverbial mountain which grew from a similar molehill.

We know that we can look forward to your cooperation in making the necessary corrections in the operation of your store and look forward to your next supervisor's report which, we are certain, will indicate the improvement necessary.

Sincerely yours,

CARVEL STORES OF PENNSYLVANIA, INC.

/s/ CHARLES MARINO
Charles Marino
Chief Supervisor

CM:jg

PLAINTIFFS' EXHIBIT 52

April 26, 1957

REGISTERED RETURN RECEIPT REQUESTED
SPECIAL DELIVERY

Mr. Sol Rodens
Carvel store #209
Island Road & Elmwood Avenue
Philadelphia, Pa.

Dear Mr. Rodens:

We are the attorneys for Carvel Stores of Pennsylvania, Inc. It has been brought to our attention that you are using and selling various unauthorized items, to wit: an unauthorized quart container. This is in violation and breach of the requirements of your Franchise Agreement and Standard Operating Procedures Manual.

It is imperative, if your rights under the Franchise Agreement and Lease are not to be seriously impaired, that you immediately remove all unauthorized merchandise and cease selling and otherwise handling the same. We trust that this will be done without delay.

It has been further brought to our notice that you have expressed the intention of purchasing your paper goods

elsewhere. This is perfectly proper, provided only that you conform with Par. 9th of your Franchise Agreement, and attention is specifically brought to the following sentence of said paragraph:

> "In the event that the Dealer desires to purchase his printed paper goods from sources other than Carvel, Carvel shall license manufacturers of such products to print the Carvel name thereon in connection with sales to the Dealer, with products made in accordance with Carvel standards."

We, therefore, bring to your attention that before any such paper goods are used, they must be submitted to Carvel for approval and in order to assure that all of the Carvel standards and requirements are met.

I note that on September 19, 1956 you and your wife appeared at a conference with Mr. Vettel and Mr. Gill of the Carvel organization for the purpose of correcting numerous violations which had put your franchise near cancellation. I trust that the same situation will not occur again.

Very truly yours,

FRANKLIN & AGREE

Philip Agree

PA:em

PLAINTIFFS' EXHIBIT 72

(Letterhead of Carvel Stores of New York, Inc.)

Please Reply To
Our New Office
430 Nepperhan Ave.
Yonkers, New York

August 11, 1960

Mr. & Mrs. Matthew Seu
Carvel Store #341
23 Park Hill Road
Bristol, Connecticut

Dear Mr. & Mrs. Seu:

We have just received your supervisor's report dated August 5th, 1960 and have noticed that you have stopped selling potato chips from your store.

We appreciate very much your cooperation in this matter since it is through such cooperation to assist us in maintaining the uniformity of the chain and the value of the various Carvel trademarks.

Thank you again for your cooperation.

Sincerely yours,

CARVEL STORES OF NEW YORK, INC.

/s/ FRED VETTEL, JR.
Fred Vettel, Jr.

FVJ:mk

PLAINTIFF'S EXHIBIT 75

(Letterhead of Carvel Stores of New York, Inc.)

MERCHANDISING DIVISION

February 17, 1956

Mr. Paul Giberman
Carvel Store #256
311 Snowball Drive
Levittown, Pennsylvania

Dear Mr. Giberman:

With reference to your request for permission to install an additional low temperature cabinet, approval is granted for a 52 cubic foot low temperature upright two door cabinet outside dimensions 76 inches by 75⅝ inches by 34 inches having an insulated wall thickness of 5 inches and equipped with a remote water cooled condensing unit of not less than two horse power capacity with a guaranteed inside temperature of not more than minus 20 degrees fahrenheit when completely filled with Carvel Ice Cream. The exterior of the box will be finished with aluminum or a baked white enamel finish and the interior will be aluminum or stainless steel. The installation of the remote condensing unit would be made in the stock room of the rear portion of your store, and all electrical and plumbing installations necessitated by this unit must be made by a licensed mechanic to conform to local codes in such a manner as to be inconspicuous and to not interfere with the normal operation of your store. The low temperature cabinet itself would be installed against the rear wall of the Sales Room of your store.

It is to be clearly understood that all expenses in conjunction with this equipment as to purchase price, installation, upkeep, and repair, are your obligation, and there will be no obligation on the part of Carvel as to this equipment. However, all of the requirements of our Franchise Agreement must be met by you with respect to this equipment.

If you have any other questions with regard to this installation, please do not hesitate to contact the writer.

Sincerely yours,

CARVEL MERCHANDISING DIVISION

/s/ FRED VETTEL, JR.
Fred Vettel, Jr.

FVJ:el

PLAINTIFFS' EXHIBIT 79

(Letterhead of Carvel Stores of New York, Inc.)

REPLY TO 80 Woodworth Avenue
Yonkers, New York

August 23rd, 1957

Mr. Lester Modick
Carvel Store #368
2739 Maine Street
Hartford, Connecticut

Dear Mr. Modick:

We have just received your Supervisor's report dated August 14th, 1957, and were pleased to note that the general operation of your Store continues to be good.

There is one item on the report to which we direct your attention, and that is the sale of hot fudge sundaes in a thick shake container.

In order to preserve the uniformity of Carvel Stores and their operation, we must request that you confine the products offered to Carvel customers to those which have received the approval of Carvel and for which recipes have been written.

We are happy to receive any suggestions from a Store owner for new items at any time, however, these items cannot be sold under the Carvel name until tested and

approved. We feel confident that you will appreciate the necessity of this uniformity and for the control of items offered to Carvel customers. We therefore take this opportunity to thank you for your cooperation.

Sincerely yours,

CARVEL STORES OF NEW YORK, INC.

/s/ ROBERT BEARDSLEY
Robert Beardsley
Chief Supervisor

RB:dd

CARVEL DEFENDANTS' EXHIBIT C-1B

(Letterhead of Carvel Stores of Pennsylvania, Inc.)

GENERAL OFFICES

February 27, 1956

TO ALL CARVEL DEALERS:

Some time ago we thoroughly overhauled your Manual of Standard Operating Procedure and replaced it by a new Manual.

We have previously advised you that the new S.O.P. is the only one presently in force and effect. The old S.O.P. is entirely superseded.

In order to conform your Franchise Agreement with the method of operations now in effect, as expressed in the S.O.P., we are herewith advising you as follows:

1. All references in your agreement and/or the Standard Operating Procedure Manual to the retail prices of Carvel's Frozen Dairy Product, in its various forms, are deemed to be references to *recommended* prices only. These prices are based upon your company's considerable experience, and the sincere conviction that the price so recommended is both acceptable to the public, and profitable for your opera-

tion. However, you are entirely at liberty to vary these prices if you so desire, and we disclaim any intention to control your retail prices.

2. All references in your agreement and/or in the Standard Operating Procedure to machines, equipment, and supplies (including paper goods) are to be understood only as setting forth the *standards and specifications* prescribed for such items. You may purchase such items from Carvel, at the prices set forth in our regular price list, or from any other source of your own choosing, provided, of course, that all such items satisfy the standards and specifications set forth in the Manual. In the event that you desire to purchase your printed paper goods from other sources, we shall be glad to license manufacturers of such products to print the "Carvel" name thereon in connection with sales to you. These paper goods must, of course, be made in accordance with Carvel's standards.

These uniform standards and specifications are necessary to enable you and all other store operators to continue to produce the Carvel Frozen Dairy Product of the high quality and uniform appearance which the public expects, and which the "CARVEL" name conveys to it.

3. It should be clearly understood, however, that you must continue to buy from Carvel (or from sources of supply designated by Carvel) the mix (made according to our own Special Formula), as well as the toppings, flavorings and other ingredients, and also the cones—in short, all items which are sold as parts of the end product that is offered as Carvel's Frozen Dairy Product, in its various forms, to the retail purchaser who consumes it. This is necessary because the public comes to your store to buy a "CARVEL" product—and it is a "CARVEL" quality product that you sell in that fashion.

If you have any questions, please write or phone, or arrange for a personal conference at our Hartsdale Office.

Yours sincerely,

/s/ Fred Vettel, Jr.
Fred Vettel, Jr.

CARVEL DEFENDANTS' EXHIBIT C-3

80 Woodworth Avenue
Yonkers, New York

June 7th, 1957

Mr. Paul Giberman
Carvel Store #256
311 Snowball Drive
Levittown, Pa.

Dear Mr. Giberman:

Thank you very much for your letter of May 31st, 1957, contained in which was your report on the sale of "The Missile". These figures were certainly outstanding, and you are to be complimented on your efforts in testing this item.

You also mention in your letter that you would like to have a large sign made advertising Papapaloozas at 7 for a $1.00. You, of course, realize that the Carvel organization can in no way control the price of any Carvel item which you offer to our customers. The price for which you sell the item must be determined by you. Carvel can only recommend a fair price which shows you a fair profit on the item. However, we do require that the items be made according to the recipe as contained in your S.O.P. So long as the weights and products are as outlined in the recipes, the store owner's obligation to Carvel has been fulfilled.

As for the sign which you requested; we do not have any facilities for making an individual sign for a particular store. We would therefore recommend that you contact your local sign writer, and have him make a sign for you to the dimensions, general layout and type design of the normal Carvel feature poster. We are certain that you will find this to be highly satisfactory.

We look forward to your continued advice as to the sales and customer reaction for the item which you are testing.

Sincerely yours,

CARVEL MERCHANDISING DIVISION

FRED VETTEL, JR.

FVJ:dd

(See Opposite) ☞

5245 Rising Sun Ave
Philadelphia 20, Pa.

Fri. Sept 5, 1958.

Dear [redacted]

~~Enclosed find order for~~ Also send me ~~5 prices~~ Richardson's Rust ~~Peeler~~

I would like to know if you have the signs that advertise the items + give the prices of them. Such as ~~the~~ Take Home menus, made up without the prices on them.

There are quite a few items that I would like to change the prices on.

If you have it any, could you have a few made up for me. If I can't get them. I will have to put up my own signs with the new prices

~~P.S. Please send~~ James B. Price.
~~Thanks~~ # 243
~~so much~~

Advertising Dept.
September 8, 1958

Mrs. James Pierce
Carvel Store #243
5245 Rising Sun Avenue
Philadelphia, Pennsylvania

Dear Mrs. Pierce:

In reply to your recent request, please be advised that we do not have signs for Daily Features without recommended prices; however, we do have price change stickers, which are available through the Order Department.

Hope we have been of some assistance to you.

Yours very truly,

CARVEL STORES OF NEW YORK, INC.

WALTER DIETZE
Advertising Manager

WD:nb

CC: MRS. WENRICH, MR. CLARK, MR. MARINO

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80 Woodworth Ave.
Yonkers, New York

September 16th, 1958

Mr. & Mrs. James Pierce
5245 Rising Sun Ave.
Philadelphia, Pa.

Dear Mr. & Mrs. Pierce,

We have on order, menu posters with the names of items, but no prices.

Please order same on your next order, and they should be in at that time.

If we can be of any help in the future, please do not hesitate to call upon us.

Very truly yours

CARVEL MERCHANDISING DIVISION

STAN W. TOWNSEND

SWT/dph

---

80 Woodworth Ave.
Yonkers, New York

March 20, 1959

Mr. & Mrs. Matthew Seu
Carvel Store #341
23 Park Hill Road
Bristol, Connecticut

Dear Mr. & Mrs. Seu:

Thank you for your letter dated March 15, 1959.

We would suggest that before you consider a venture of this type that you first consult your attorney, your local health and food and drug departments and your State Food and Drug or Department of Agriculture, since it is our opinion that this type of operation would immediately place you in the wholesale business and would require an entirely new and different licensing arrangement for your store.

After you have had an opportunity to consult your attorney and the various agencies, we would appreciate having passed on to us the information which you receive.

With regard to your questions concerning prices, these questions would have to be resolved by you as the store dealer, since any determination of price with regard to the merchandise which you sell would have to be made by you and could not be made by this organization.

We appreciate very much your writing to us, and after we have received the additional information from you, we will be pleased to offer any possible advice to you.

Sincerely yours,

CARVEL STORES OF NEW YORK, INC.

FRED VETTEL, JR.

FVJ:jg

290

October 10, 1957

Mr. William Hanelik
Carvel Store #153
2804 Main Street
Endicott, New York

Dear Mr. Hanelik:

Thank you for your letter received in this office on October 2nd.

With regard to your request for permission to sell 3 pints of Carvel ice cream for $1. The Carvel organization can only recommend the selling price of any item dispensed to a Carvel customer. These selling prices are recommended as being those which show a fair return of profit to the store owner and represent a fair return to the customer. The final determination of any selling price at the customer level must be that of the store owner. The decision with regard to your request would therefore be yours.

As for your requests for additional items to be included in the menu of the stores, we will be happy to refer these requests to the Board of Governors at their next meeting. After due discussion among the Board of Governors, we will be happy to advise you as to their decision.

Thank you very much for your interest in writing to us.

Sincerely yours,

CARVEL MERCHANDISING DIVISION

FRED VETTEL, JR.

FVJ:jg

April 15, 1959

Mr. Burton W. Stone
66 Sheep Lane
Levittown, New York

Dear Mr. Stone:

Thank you very much for your letter of April 11, 1959, with regard to the price charged you at the Carvel Store located on White Plains Road in the Bronx.

All Carvel stores are operated under a franchise agreement between the store owner and the Carvel organization. While we endeavor in every respect to maintain equality in every store which is represented by the Carvel trademark, we cannot in any way control the price at which the merchandise is sold. There are numerous federal regulations which prohibit any type of price control. The determination of the selling price of any products sold under the Carvel trademark is made by the store dealer and, therefore, you will find that there is a variation in selling price from one store to another. We regret this situation, but believe that you can readily understand that it is one over which we have no control.

We appreciate very much your interest in writing to us and hope that you will continue to be numbered among the millions of boosters of Carvel products.

Sincerely yours,

CARVEL DARI-FREEZE STORES, INC.

FRED VETTEL, JR.

FVJ:jg

August 29, 1958

Mr. Harry Bart
267 Beach 15th Drive
Far Rockaway, New York

Dear Mr. Bart:

Your card addressed to Flying Saucer, P. O. Box 338, Elizabeth, New Jersey, has reached this office.

All Carvel stores are individually owned and operated under a Franchise granting them the use of the Carvel name.

In our capacity as the granters to the Franchise for the use of various trademarks, we can protect the quality of the products sold under those trademarks. However, the determination of the selling price of those products must be that of the store owner, since under the laws of the community, we cannot exert any control over selling prices.

We appreciate your confusion in this regard and can only suggest that you patronize those stores which afford you the best possible retail price.

We appreciate very much your interest in writing to us and hope that you will continue to be numbered among the millions of enthusiastic Carvel customers.

Sincerely yours,

CARVEL DARI-FREEZE STORES, INC.

FRED VETTEL, JR.

FVJ:jg

80 Woodworth Ave.
Yonkers, New York

September 6th, 1957

Mrs. R. F. Malone
607 West 191st Street
New York 40, N. Y.

Dear Mrs. Malone:

Thank you very much for your letter inquiring as to the location of Carvel Stores, which was received in this office on September 6th.

The Carvel Organization has three (3) Stores located in the general area of your address. One is at 10-30 Nagle Avenue, near 196th Street; another at 505 West 181st Street; and the third at Broadway and West 236th Street. It would appear that the Store on Nagle Avenue, near 196th Street, is the one closest to you.

The price of Carvel ice cream, as sold to the local Store customers, is determined by the local Store operator. However, most of the Stores conform to a price of 45¢ or 50¢ per pint, with comparative reductions as the quantity increases. Carvel ice cream can be transported and facilities are available in each Store for packaging the ice cream, even distances which might require 2 or 3 hours of travel time.

We look forward to your trying Carvel products and know that you will soon become one of the millions of enthusiastic, satisfied Carvel customers.

Sincerely yours,

CARVEL MERCHANDISING DIVISION

FVJ:dd

FRED VETTEL, JR.

May 15, 1959

Mr. Seymour Rook
1090 East New York Ave.
Brooklyn 12, N. Y.

Dear Mr. Rook:

Thank you very much for your letter of May 10, 1959, addressed to Hartsdale, New York which did not reach this office until May 12th.

All Carvel stores operate under a Franchise granted by the Carvel Organization to an individual dealer. We require and endeavor in every way possible to maintain the consistent quality of the products being sold under the Carvel Trademark and believe that we have been successful in this endeavor. However, various federal agencies have ruled on numerous occasions that the determination of the selling price of any item must be made by the individual dealer, and we are, therefore, unable to control the price at which various items are sold to you from Carvel stores. While there is and will continue to be some variation in the price which you pay for any particular item from one store to another, the quality should be consistent, and there should be no variation of the quality with the price.

We regret very much this situation with regard to selling prices, however, we believe you can correctly understand one over which we have no control.

We appreciate very much your interest in writing to us and hope that you will continue to be one of the many millions of enthusiastic boosters of Carvel products.

Sincerely yours,

CARVEL DARI-FREEZE STORES, INC.

FRED VETTEL, JR.

FVJ:nb

CARVEL DEFENDANTS' EXHIBIT C-5

80 Woodworth Avenue
Yonkers, New York

November 27, 1959

Mr. J. Hack
Carvel Store #49
439 Market Street
Saddle Brook, New Jersey

Dear Mr. Hack:

Thank you for the specifications on the refrigerated front counter installed in your store which you forwarded in your letter of October 15, 1959.

We have submitted the specifications to our Engineering Department and have received their report.

The specifications, as outlined in your letter of October 15th, meet with our requirements for use in your Carvel store *for storage and display purposes only.*

Thank you for this opportunity of being of some small service to you.

Very truly yours,

CARVEL DARI-FREEZE STORES OF NEW JERSEY, INC.

CHARLES MARINO,
Chief Supervisor

CM:jv

"See You at the Convention—February 24th and 25th."

April 19, 1960

Mr. Albert Evangelista
Carvel Store #187
152-11 Union Turnpike
Flushing, L. I., N. Y.

Dear Mr. Evangelista:

The soda dispensing equipment as described in your letter and attached drawing for March 31st, 1960 is approved for installation in your store #187.

As you know, the above approval is contingent on your properly executing the enclosed Rider to your Franchise Agreement and the enclosed receipts to the additional S. O. P. pages necessary to the operation of the soda equipment. If you will sign all copies of the Rider to the Franchise Agreement and the receipt to the additional S. O. P. pages and have them properly witnessed and returned to this office, we will be pleased to forward you copies for your files and our final approvement in this matter.

We appreciate very much this opportunity to be of some small service to you. With best wishes for a very prosperous new season.

Sincerely yours,

CARVEL STORES OF NEW YORK. INC.

Stan W. Townsend
Merchandising Department

SWT:jm
enc.

November 2, 1961

Messrs. Mucha & Huba
Carvel Store #175
1075 St. George Avenue
Colonia, New Jersey

Gentlemen:

The additional specifications requested in our letter of September 11 have finally been received and we are now in a position to answer your request for approval of August 8, 1961, for a low temperature cabinet.

The cabinet described in the specifications received indicating a 13.1 cubic foot low temperature cabinet, equipped with a ⅓ horsepower, 115 volt, 60 cycle, single phase condensing unit, with baked white enamel walls and stainless steel top, with 3½" insulation and equipped with a syrup rail containing nine syrup jars, is approved for use as a storage cabinet *only*. However, the cabinet is not approved for use as a hardening cabinet. Any merchandise placed in this cabinet for storage will have to be first hardened in your Carvel cabinet.

We appreciate this opportunity to be of some small service to you.

Sincerely yours,

CARVEL DARI-FREEZE STORES
OF NEW JERSEY, INC.

Fred Vettel, Jr.

FVJ:es

January 25, 1960

Messrs. P. & A. Vignole
Carvel Store #160
617 E. Milton Avenue
Rahway, New Jersey

Attention: *Mr. Frank Vignole*

Gentlemen:

Under separate cover we have returned to you the drawings of the Grand Rapids Cabinet Company, file #01629-A and #01630-A, both dated September 30, 1959, together

with your drawing showing the location of the rearranged equipment which we have assigned #0160-1-22-60.

Equipment for dispensing sodas, toppings and shake base, as specified in drawing #G-1629-A, is approved for installation in your Store #160, as is equipment as specified in drawing #G-1630-A. As indicated in the specifications, this equipment will be refrigerated with a ¾ horsepower water cooled compressor and a carbonator to meet the minimum requirements of those of a soda dispenser barrel, will be provided for use in conjunction with the equipment. The moving of your equipment, including that mentioned above to conform to your drawing #0160-1-22-60, is also approved.

As you know, the above approval is contingent on your properly executing the enclosed Rider to your Franchise Agreement and the enclosed receipts for the additional S. O. P. pages necessary to the operation of the soda equipment. If both of you will sign all copies of the Rider to the Franchise Agreement and the receipt for the additional S. O. P. pages, and have them properly witnessed and returned to this office, we will be pleased to forward you copies for your files.

We appreciate very much this opportunity to be of some small service to you. Looking forward to meeting you both at the fast approaching Convention.

Sincerely yours,

CARVEL STORES OF NEW YORK, INC.

Fred Vettel, Jr.

FVJ:jv
Pres.

80 Woodworth Avenue
Yonkers, N. Y.

July 23, 1959

Messrs. Harriss & Wojcik
Carvel Store #130
315 Main St.
Madison, N. J.

Gentlemen:

Your manager, Mrs. F. Englander, has written to us for approval of a low temperature cabinet for installation in your Store #130.

The specifications as submitted indicate that the equipment in question is strictly home-type equipment and could not in any way be construed as commercial equipment. This equipment might be satisfactory for the storage of certain frozen foods already prefrozen, such as, frozen strawberries, frozen peaches, frozen pineapple, etc. This equipment could not be approved for use in the normal operation of a Carvel Store since any use of this equipment for hardening could only result in a most inferior product being sold under the Carvel trademark.

We are enclosing a copy of the specifications for equipment normally used in the operation of a Carvel store. You will note that these specifications require a ¾ h.p. condensing unit for a 17 cu. ft. cabinet, which is necessary in order to maintain the required temperature. The specifications submitted by your manager indicated a ⅓ h.p. compressor for a 25 cu. ft. freezer, which could not possibly produce the required temperature and maintain it for normal operation.

If we can be of any help to you in reviewing the specifications of any other equipment you may propose, please do not hesitate to call upon us at any time.

Sincerely yours,

CARVEL DARI-FREEZE STORES OF NEW JERSEY, INC.

Fred Vettel, Jr.

FVJ:eb

September 19, 1957

Messrs. Alfred & Francis Zeronda
Carvel Store #129
2406 Curry Road
Schenectady, New York

Attention: Mr. Alfred Zeronda

Gentlemen:

We have just received your Supervisor's Report dated September 14, 1957, and were disappointed to learn the operation of your store is far below the high standards of the Carvel chain.

We note that you are using unapproved merchandise in the service of your Carvel customers. This may be misleading to your customers in that they expect to receive in the end product all Carvel merchandise, and you are using that which has not been approved or endorsed by our laboratory as conforming to the quality and standards of Carvel. This misrepresentation may cause great damage to your business and our customer relationship, consequently damaging the Carvel name.

We are also advised that you are using unapproved paper goods in the service of your Carvel customers. As you are aware, Carvel has no objection to your purchasing paper supplies from sources other than Carvel, so long as the supplies purchased are in accordance with our specifications. However, the particular paper goods referred to have not been approved by Carvel. Uniformity is a great asset to our stores, and we, therefore, request that the use of this objectionable merchandise be discontinued upon receipt of this notice.

We request your cooperation in the removal of the unapproved merchandise from your store within five (5) days of this writing.

We look forward to your cooperation in this matter.

Sincerely yours,

CARVEL MERCHANDISING DIVISION

Fred Vettel, Jr.

FVJ:jg

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

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80 Woodworth Avenue
Yonkers, New York

September 4, 1957

Mr. and Mrs. Frank Martone
Carvel Store #202
1422 Asbury Avenue
Asbury Park, New Jersey

Dear Mr. and Mrs. Martone:

We have just received a report from your area Supervisor dated September 3, 1957 which indicates an item of unapproved equipment in the salesroom of your store. In order to preserve the uniformity of Carvel stores and their operation, we must request that you give us your cooperation in confining your needs to Carvel approved equipment only.

We are enclosing a copy of the specifications for a Carvel Upright Low Temperature Cabinet. Before granting approval for the installation of the Upright Low Temperature Cabinet in your store, we will first have to have an opportunity to review the specifications of the equipment which you have installed. We would, therefore, suggest that you submit to us at your earliest convenience, the specifications of the equipment in question and we will be happy to reply by return mail. We feel confident that you will appreciate the necessity of this uniformity and there-

fore take this opportunity to thank you for your cooperation in maintaining it.

Sincerely yours,

CARVEL MERCHANDISING DIVISION

Robert E. Beardsley
Chief Supervisor

REB:tp
Enc.

November 2, 1961

Messrs. Mucha & Huba
Carvel Store #175
1075 St. George Avenue
Colonia, New Jersey

Gentlemen:

The additional specifications requested in our letter of September 11 have finally been received and we are now in a position to answer your request for approval of August 8, 1961, for a low temperature cabinet.

The cabinet described in the specifications received indicating a 13.1 cubic foot low temperature cabinet, equipped with a ⅓ horsepower, 115 volt, 60 cycle, single phase condensing unit, with baked white enamel walls and stainless steel top, with 3½" insulation and equipped with a syrup rail containing nine syrup jars, is approved for use as a storage cabinet *only*. However, the cabinet is not approved for use as a hardening cabinet. Any merchandise placed in this cabinet for storage will have to be first hardened in your Carvel cabinet.

We appreciate this opportunity to be of some small service to you.

Sincerely yours,

CARVEL DARI-FREEZE STORES
OF NEW JERSEY, INC.

Fred Vettel, Jr.

FVJ:es

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

September 1, 1959

Mr. & Mrs. Paul Giberman
Carvel Store #256
Rt. #413, Near Plumridge Pass
Bristol Township, Pennsylvania
2HCIH80e

Dear Mr. and Mrs. Giberman:

With regard to our letter of August 4, 1959, concerning your use of unauthorized paper cups in connection with the sale of products from your Carvel Store, we have not received any assurance from you that you would discontinue the use of such merchandise. We have further been informed, by our client, Carvel Stores of New York, Inc., that your latest Supervisor's Inspection Report dated August 10, 1959, indicates that you are using unapproved flavor syrups, to wit: unapproved cherry syrup and unapproved strawberry syrup for ice cream sodas sold under the Carvel name from your Carvel Store.

Your Franchise Agreement, #000558, dated September 27, 1955, makes the following provision for paper goods to be used in your Carvel Store:

> "NINTH: In connection with the operation of a Carvel Store and to comply with the specifications set forth in the Manual, the Dealer is required to purchase various items of machinery and equipment, and paper goods, a list of which is set forth in the Manual. To the extent that Carvel is able to supply the same, the Dealer shall have the right to purchase such machinery, equipment, and paper goods, if he so desires, from Carvel, at prices fixed by Carvel from time to time. The Dealer's obligation under this paragraph is satisfied so long as the Dealer equips his Store and keeps it maintained in accordance with the specifications contained in the Manual. In the event that the Dealer wishes to purchase his printed paper goods from sources other than Carvel, Carvel shall license manufacturers of such products to print the Carvel name thereon in connection with sales to the Dealer, with products made in accordance with Carvel standards.

Under the terms of this provision of the Franchise Agreement, you may purchase your paper goods from sources other than Carvel, if you have received approval of the standards and specifications of such merchandise from Carvel. In the event such paper goods meet Carvel standards, the supplier will be licensed to print the Carvel name and trademarks on the same for use in your Carvel Store.

As for your use of unapproved flavor syrups, we respectfully bring to your attention Paragraph "SIXTH" of your Franchise Agreement, which provides as follows:

> "In order to safeguard the integrity of Carvel's trademarks, the Dealer agrees that he will purchase from Carvel or from approved sources designated by Carvel, his entire requirements of Carvel Frozen Dairy Product mix, toppings, flavorings and other ingredients, cones and any other items sold as part of the end product that is offered for consumption to the retail purchaser . . ."

The use of unapproved flavor syrups is a direct violation of this provision of the Agreement. Furthermore, passing off an item as a Carvel product, which is not in fact composed of Carvel ingredients throughout, constitutes a direct infringement of Carvel trademarks.

Your Franchise Agreement was designated to protect your own interests in your Carvel Store, as well as to safeguard the Carvel name and trademarks and the interests of each of the many other franchised Dealers and the General Public. In view of the fact that our client has no record of having received the specifications of the paper cups you have obtained from a source other than Carvel and because your use of unapproved flavor syrups constitutes an infringement of Carvel trademarks, Carvel Stores of New York firmly requires that you submit the specifications of such paper goods for approval and that you discontinue the use of unapproved flavor syrups in the

preparation of products sold from your Carvel Store under the Carvel name and trademarks.

Very truly yours,

AGREE & MARCIANTE

Norman S. Isko

NSI:jv
CC: Mr. & Mrs. P. Giberman
311 Snowball Drive
Levittown, Pennsylvania

January 23, 1956

Mr. Paul Giberman
Carvel Store #256
311 Snowball Drive
Levittown, Pennsylvania

Dear Mr. Giberman:

United Equipment Company has forwarded to us the drawings and specifications together with a letter of confirmation from the Sub-Zero Freezer Company regarding their model #60 Upright Cabinet.

The letter from the Sub-Zero Freezer Company would seem to indicate that this box would come up to the standards, however, they neglected to state whether the condensing unit is an air cooled or water cooled one and since this has a direct connection to our building specifications, we would appreciate an indication as to which type unit is intended for installation.

We would also require from you a drawing indicating the location at which the remote compressor would be installed.

Will you please expedite the information requested above so that we may conclude this matter as soon as possible.

Sincerely yours,

CARVEL MERCHANDISING DIVISION

Fred Vettel, Jr.

FVJ:el

June 17th, 1957

Mr. Lester N. Modick
Carvel Store #368
Main & Kensington Streets
Hartford, Connecticut

Dear Mr. Modick:

Pursuant to our telephone conversation on specifications for air-conditioner for the interior of your store. Please be advised the only requirement we make is that the unit is installed in the back room of the store leaving front room entirely free for ice-cream equipment.

I have relayed this information to Mr. Nutt who will call yon on same.

We remain,

Yours very truly,
CARVEL CORPORATION
FRANK J. HUBNER

FJH:DG

cc: Mr. Darrow Nutt,
Hartsdale

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80 Woodworth Avenue
Yonkers, New York

August 30th, 1957

Mr. & Mrs. Lee Murrell
Carvel Store #1012
13105 N. Dixie Hwy.
N. Miami, Florida

Dear Mr. and Mrs. Murrell:

To date we have not been favored with a reply to Mr. Vettel's letters of July 28th and August 16th, respectively, concerning the installation of an upright low temperature cabinet in your Store #1012.

As indicated in our letter of August 5th, your Supervisor reports that a chest type home freezer has been installed

in your store. Your Supervisor's reports subsequent to August 1st indicate that this equipment is now installed in the backroom. We have no objection to the freezer, provided it remains in the back room, and is used only for the storage of frozen strawberries and merchandise other than Carvel ice cream products.

We feel confident that you will appreciate the necessity of this uniformity and the requirement that we determine the specifications of equipment used in the processing and storage of ice cream sold to your Carvel customers.

We therefore take this opportunity to thank you for your cooperation.

Sincerely yours,

CARVEL STORES OF NEW YORK, INC.

Robert E. Beardsley
Chief Supervisor

REB:ds

cc: Mr. Quick

August 22, 1956

Mr. & Mrs. Vito Caruso
Carvel Store #260
530 Kings Highway
Brooklyn, New York

Dear Mr. & Mrs. Caruso:

It has been brought to our attention that you are under a misapprehension regarding the installation of equipment in your store. To clarify this matter with regard to equipment in your store, we requote from our letter mailed to you on February 27, 1956, paragraph 2 of which read:

> "You may purchase such items from Carvel, at the prices set forth in our regular price list, or from any other source of your own choosing, providing, of course, that all such items satisfy the standards and specifications set forth in the manual."

You can see from the above that for you to purchase equipment from a source other than Carvel has been our policy for some time past. However, in order to maintain the uniformity of Carvel stores and the quality of the products sold under the name Carvel, we must insist that any equipment purchased meet with the specifications which are necessary to preserve that reputation.

We hope the above will eliminate any misunderstanding which you may have had with regard to the purchase of equipment for your store.

Sincerely yours,

CARVEL MERCHANDISING DIVISION

Fred Vettel, Jr.

FVJ:jg

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80 Woodworth Ave.
Yonkers, N. Y.

May 24, 1956

Mr. & Mrs. William King
Carvel Store #231
9 Woodcliffe Avenue
Media, Pennsylvania

Dear Mr. & Mrs. King:

We have just received your supervisor's report dated May 21, 1956, and were delighted to learn of the excellent operation and condition of your store.

At the time of her visit your supervisor noticed that you installed an unapproved refrigerator on the premises. If this is a home type refrigerator, we must request that it be removed immediately. However, if this is a low temperature refrigerator capable of maintaining a maximum of 0° when filled, it will be permissible for it to remain, in the back room of your premises in such a location as to be unseen by your customers.

We would appreciate your advising us as to your intentions with regard to this unapproved equipment.

May we take this opportunity to congratulate you on the high standards which you have maintained in your store operation.

Sincerely yours,

CARVEL MERCHANDISING DIVISION

Fred Vettel, Jr.

FVJ:jg

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80 Woodworth Ave.
Yonkers, N. Y.

June 8, 1956

Mr. & Mrs. LeRoy Knoch
Carvel Store #103
R.D. #3
Pottsville, Pennsylvania

Dear Mr. & Mrs. Knoch:

We have just received your Supervisor's report dated May 25, 1956 and note that you have in use an unauthorized low temperature cabinet in the back room of your store.

If this low temperature cabinet will maintain a temperature of at least 0° when filled, it will be permissible for it to be temporarily installed in the back room of your store, out of sight of your customers.

We hope that the above will clarify the situation regarding this freezer.

Sincerely yours,

CARVEL MERCHANDISING DIVISION

Fred Vettel, Jr.

FVJ:jg

September 25, 1956

Mr. Frank Thomas
Carvel Store #147
809 First Avenue
Asbury Park, New Jersey

Dear Mr. Thomas:

This is to confirm our recent telephone conversation with regard to a low temperature cabinet.

Permission for the installation of an upright freezer is granted providing it meets with the following specifications. It must be a commercial type freezer with at least 4" insulation and must have a ¾ horse power compressor to cool 35 cu. ft. of storage space or less to produce a temperature, when filled, of at least 20 degrees below zero.

Should you be in need of any further assistance, please do not hesitate to call upon us.

Sincerely yours,

CARVEL MERCHANDISING DIVISION

Fred Vettel, Jr.

FVJ:jg

September 19, 1956

Mr. Edward H. Rehrer
Carvel Store #148
4483 N. Front Street
Harrisburg, Pennsylvania

Dear Mr. Rehrer:

Thank you for your letter received in this office September 13th.

There would be no objection to the installation of an upright low temperature freezer in your store providing it meets the specifications which are necessary for the efficient operation of your store in serving a quality Carvel product. Fundamentally, the specifications are such that would re-

quire a temperature of 20 degrees below zero Fahrenheit when fully filled and that the walls, doors, etc. be of the commercial freezer-type construction. It is difficult to give you any further specifications with regard to the refrigeration necessary for efficient performance unless you advise us of the capacity of the freezer and its construction.

While it is true, as you mentioned in your letter, that paragraph 9 does not mention any items other than those listed in the S.O.P. with reference to unauthorized equipment, if you will refer to paragraph (1) "Carvel Store", under deficiencies you will find that it provides for the store to be maintained and operated in accordance with the original Carvel plans and specifications. If you will refer to the original plans and specifications for your store, you will find that there is no provision in them for a storage cabinet such as you mention in your letter. However, neither this paragraph nor any other part of the Franchise Agreement is intended to place a hardship on the store owner in his efforts to promote the maximum amount of business for his store. Therefore, you will also find in the same paragraph that provisions have been made for the dealer to make changes and/or alteration providing they are authorized in writing by the parent organization.

All of the provisions of our Franchise Agreement were developed with but one thought in mind, that being the protection of the dealer so that no store could operate in such fashion as to jeopardize the reputation of the name Carvel for quality products. With respect to the particular type freezer in question, should we permit the installation of any low temperature freezer, you would find that many stores would install a freezer of inferior quality with ensuing disasterous results to the product. Quality take-home items require the quick freezing of the soft product to eliminate the hazard of crystallization.

We believe that after consideration of the foregoing, you will concur in our desire to protect your business and the entire chain through the supervision of the products served to Carvel customers. If you will provide us with the additional information necessary, we will be happy to advise

you with regard to the cabinet for which you have requested permission.

Sincerely yours,

CARVEL MERCHANDISING DIVISION

Fred Vettel, Jr.

FVJ :jg

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80 Woodworth Ave.
Merchandising Div.
Yonkers, New York

March 20, 1956

Mr. Eli Pine
154-16 71st Avenue
Apt. 84A
Kew Garden Hills, New York

Dear Mr. Pine:

Thank you for your letter dated February 29th, 1956.

In order to grant your request for permission to place an additional low temperature cabinet in your store, it would be necessary that you submit specifications of this cabinet for review by our engineering department. The specifications are to include the size of the compressor, the temperature the box will maintain when the box is fully loaded with ice cream, the wall thickness, insulation, etc.

As soon as we have received all of the information concerning this, we will be happy to give you a decision on this.

Sincerely yours,

CARVEL MERCHANDISING DIVISION

Fred Vettel, Jr.

FVJ :el

September 4, 1956

Mr. Herman Eisenburg
Carvel Store #222
551 N. Easton Road
Glenside, Pennsylvania

Dear Mr. Eisenburg:

With reference to your letter regarding permission to purchase an upright freezer for your store.

Permission for the purchase of an upright freezer is granted providing it meets with the following specifications. It must be a commercial type freezer with at least four inch insulation, and must have a three-quarter horse power compresser to cool thirty-five cubic feet of storage space or less.

We hope that the above information is that which you require to make a decision. If you may be in need of any further help, please do not hesitate to call upon us.

Sincerely yours,

CARVEL MERCHANDISING DIVISION

Fred Vettel, Jr.

FVJ:jg

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80 Woodworth Ave.
Yonkers, N. Y.

May 5, 1958

Mr. Alfred Mueller
Carvel Store #108
524 Center St.
Hyde Park, Reading, Pa.

Dear Mr. Mueller:

On February 27, 1958, we received an indication from you of your interest in installing equipment to dispense Carvel sodas from your store and advised you in our letter of

March 3rd, that we would inform you as to the results of the accumulated suggestions with regard to soda equipment. As you know from the Bulletin that was forwarded to all stores over date of April 30, 1958, the sale of Carvel Cola, Carvel Root Beer and Carvel Ice Cream Sodas from Carvel Retail Stores has been approved by the trademark owners of the "Carvel" name.

If you are still interested in adding these new Carvel products to your operation, we would suggest that you contact Mr. Robert Spaulding, by either writing to him at 80 Woodworth Avenue, Yonkers, New York, or calling him at YOnkers 9-6700, and he will be pleased to make arrangements to make the sale of these new items possible from your store, and at the same time, give you any additional information with regard to specifications, products, etc.

Sincerely yours,

CARVEL STORES OF PENNSYLVANIA, INC.

Fred Vettel, Jr.

FVJ:eb

CARVEL DEFENDANTS' EXHIBIT C-9

SCHEDULE OF GALLONAGE OF TOTAL CARVEL ICE CREAM MIX SOLD BY THE CARVEL CORPORATE DEFENDANTS IN THE STATES OF CONNECTICUT, MASSACHUSETTS, PENNSYLVANIA, NEW JERSEY AND NEW YORK, FOR THE YEARS 1953 TO 1960, AS TAKEN FROM THE REGULAR BOOKS AND RECORDS OF THE CORPORATIONS KEPT IN THE REGULAR COURSE OF BUSINESS

CONNECTICUT

1953	7,390
1954	50,660
1955	99,910
1956	130,940
1957	161,480
1958	131,810
1959	143,340
1960	137,550

MASSACHUSETTS

1953	11,120
1954	16,980
1955	23,500
1956	23,370
1957	27,650
1958	25,810
1959	24,380
1960	22,830

PENNSYLVANIA

1953	227,580
1954	192,960
1955	194,000
1956	176,190
1957	190,350
1958	170,380
1959	159,920
1960	125,620

NEW JERSEY

1953	146,280
1954	194,420
1955	269,620
1956	277,430
1957	290,530
1958	284,660
1959	347,000
1960	332,740

NEW YORK

1953	617,450
1954	923,160
1955	1,142,490
1956	1,181,340
1957	1,245,600
1958	1,129,730
1959	1,190,920
1960	1,158,910

CARVEL DEFENDANTS' EXHIBIT C-11

GALLONAGE SCHEDULE

1954-1959

States—Carvel

	1954		1955		1956	
tate	State*	Carvel	State	Carvel	State	Carvel
onn.	8,788,000	50,660	9,135,000	99,910	9,587,000	130,940
lass.	23,461,000	16,980	27,804,000	23,500	26,738,000	23,370
a.	71,118,000	192,960	75,299,000	194,000	76,798,000	176,190
. J.	16,755,000	194,420	17,894,000	269,620	18,019,000	277,430
. Y.	64,124,000	923,160	68,475,000	1,142,490	67,889,000	1,181,340
otals	184,246,000	1,378,180	198,537,000	1,729,520	199,031,000	1,789,270
%		0.7480		0.8711		0.8989

	1957		1958		1959	
	State	Carvel	State	Carvel	State	Carvel
onn.	9,789,000	161,480	9,975,000	131,810	9,799,000	143,340
lass.	28,576,000	27,650	28,876,000	25,810	31,515,000	24,380
a.	77,734,000	190,350	77,592,000	170,380	83,053,000	159,920
. J.	19,268,000	290,530	19,466,000	284,660	22,000,000	347,000
. Y.	69,359,000	1,245,600	69,835,000	1,129,730	76,098,000	1,190,920
otals	204,726,000	1,915,610	205,744,000	1,742,390	222,465,000	1,865,560
%		0.9357		0.8468		0.8385

Source:

Annual Statistic Bulletin Publication of the U. S. Dept. of Agriculture, Agricultural Marketing Service, entitled "Production of Manufactured Dairy Products" relating to frozen dairy products, in the following bulletins:

Year	Page	Table No.
1954	15 et seq.	9
1955	19 " "	10
1956	27 " "	11
1957	10	5
1958	10	4
1959	10	4

CARVEL DEFENDANTS' EXHIBIT C-12

SCHEDULE OF GALLONAGE PRODUCTION OF FROZEN DAIRY PRODUCTS FOR THE YEARS 1953-1960 OF STATES AND CARVEL

Year	*State*	*Carvel*	*Percent*
CONNECTICUT			
1953	8,933,000	7,390	0.0827
1954	8,788,000	50,660	0.5764
1955	9,135,000	99,910	1.0937
1956	9,587,000	130,940	1.3658
1957	9,789,000	161,480	1.6496
1958	9,975,000	131,810	1.3214
1959	9,799,000	143,340	1.4628
1960	10,047,000	137,550	1.3690
MASSACHUSETTS			
1953	24,287,000	11,120	0.0457
1954	23,461,000	16,980	0.0723
1955	27,804,000	23,500	0.0845
1956	26,738,000	23,370	0.0874
1957	28,576,000	27,650	0.0967
1958	28,876,000	25,810	0.0894
1959	31,515,000	24,380	0.0773
1960	32,680,000	22,830	0.0698
PENNSYLVANIA			
1953	73,100,000	227,580	0.3113
1954	71,118,000	192,960	0.2713
1955	75,299,000	194,000	0.2576
1956	76,798,000	176,190	0.2294
1957	77,734,000	190,350	0.2448
1958	77,592,000	170,380	0.2195
1959	83,053,000	159,920	0.1925
1960	83,969,000	125,620	0.1496

	*State**	*Carvel*	*Percent*
NEW JERSEY			
1953	16,499,000	146,280	0.8866
1954	16,755,000	194,420	1.1160
1955	17,894,000	269,620	1.5067
1956	18,019,000	277,430	1.5396
1957	19,268,000	290,530	1.5078
1958	19,466,000	284,660	1.4623
1959	22,000,000	347,000	1.5773
1960	21,331,000	332,740	1.5598
NEW YORK			
1953	64,040,000	617,450	0.9641
1954	64,124,000	923,160	1.4396
1955	68,475,000	1,142,490	1.6685
1956	67,889,000	1,181,340	1.7401
1957	69,359,000	1,245,600	1.7958
1958	69,835,000	1,129,730	1.6177
1959	76,098,000	1,190,920	1.5649
1960	76,221,000	1,158,910	1.5204

* Source:

Annual-Statistic Bulletin Publications of the U. S. Dept. of Agriculture, Agricultural Marketing Service, entitled "Production of Manufactured Dairy Products" relating to frozen dairy products, in the following bulletins:

Year	*Page*	*Table No.*
1953	15 et seq.	9
1954	15 " "	9
1955	19 " "	10
1956	27 " "	11
1957	10	5
1958	10	4
1959	10	4

DEFENDANT HOOD EXHIBIT H-1

(Received in evidence p. 46c [3550].)

[Representative notice by Carvel to Carvel dealers of prices charged for Carvel special formula ice cream mix.]

(Letterhead of Carvel, 80 Woodworth Avenue, Yonkers, New York.)

October 12, 1959

Dear Store Owner:

Effective 00:01 a.m. Thursday, October 15, 1959, the price of Carvel Special Formula Mix will be $14.70 per ten (10) gallon can.

Sincerely yours,

CARVEL MERCHANDISING DIVISION

/s/ STAN W. TOWNSEND
Stan W. Townsend

SWT:jg

HD

DEFENDANT HOOD EXHIBIT H-2

(Received in evidence p. 47c [3550].)

[Representative notice by Carvel to Carvel dealers that account has been placed on C.O.D.]

(Letterhead of Carvel Stores of New York, Inc.)

80 Woodworth Avenue
Yonkers, New York

October 8, 1957

Lester & Harriet Modick
Carvel Store #368
2739 Main Street
Hartford, Connecticut

Dear Sir & Madam:

As you know your account reflects unpaid charges which are considerably past due.

It is with regret that we are obliged to inform you that your account is being placed on a C.O.D. basis until such time that your account once again becomes current.

In the meantime, we will do what we can to help you clear up old differences.

Very truly yours,

CARVEL STORES OF NEW YORK, INC.

/s/ J. C. JACKSON
Accounting Department

LE/md

Dairy: To allow 2% Cash Disc on Mix and Collect $2.50 per can Royalty.

Italicized matter handwritten notation.

(Letterhead of Carvel Stores of New York, Inc.)

80 Woodworth Avenue
Yonkers, New York

December 18, 1956

Mr. Matthew Seu
Store #341
23 Park Hill Road
Bristol, Conn.

Dear Mr. Seu:

As you know your account reflects unpaid charges which are considerably past due.

It is with regret that we are obliged to inform you that your account is being placed on a C.O.D. basis until such time that your account once again becomes current.

In the meantime, we will do what we can to help you clear up old differences.

Very truly yours,

/s/ Louis Ettlinger
Louis Ettlinger
Accounting Department

LE/md

Copy to Dairy
Collect $2.50 Royalty per can

(Letterhead of Carvel Stores of New York, Inc.)

80 Woodworth Avenue
Yonkers, New York

October 31, 1956

Mr. Joseph Phelan
Carvel Store #270
R.F.D. #3
Rockville, Connecticut

Dear Mr. Phelan:

As you know your account reflects unpaid charges which are considerably past due.

It is with regret that we are obliged to inform you that your account is being placed on a C.O.D. basis until such time that your account once again becomes current.

In the meantime, we will do what we can to help you clear up old differences.

Very truly yours,

/s/ Louis Ettlinger
Louis Ettlinger
Accounting Department

LE/md

DEFENDANT HOOD EXHIBIT H-3

(Received in evidence p. 48c [3553].)

[Representative notice by Carvel that Carvel Dealer's account has been removed from C.O.D. basis.]

(Letterhead of Carvel, 80 Woodworth Avenue, Yonkers, New York.)

March 27, 1957

Mr. & Mrs. Matthew Seu
Carvel Store # 341
23 Park Hill Road
Bristol, Connecticut

Dear Mr. & Mrs. Matthew Seu:

Thank you for making your account current again. We are notifying all suppliers to take your account off the C.O.D. basis as of today.

Very truly yours,

/s/ LOUIS ETTLINGER
Louis Ettlinger
Accounting Department

LE/md

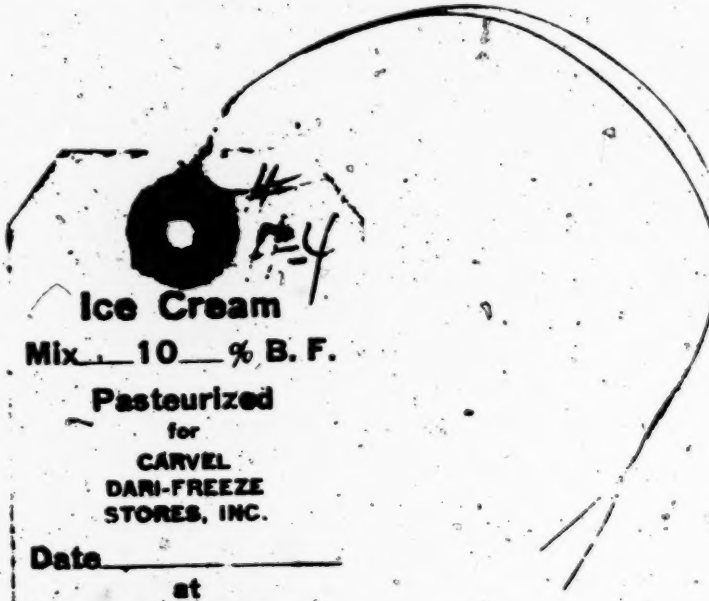
N.Y. CBC—Royalty?

Italicized matter handwritten notation.

DEFENDANT HOOD EXHIBIT H-4

(Received in evidence p. 48c [3553].)

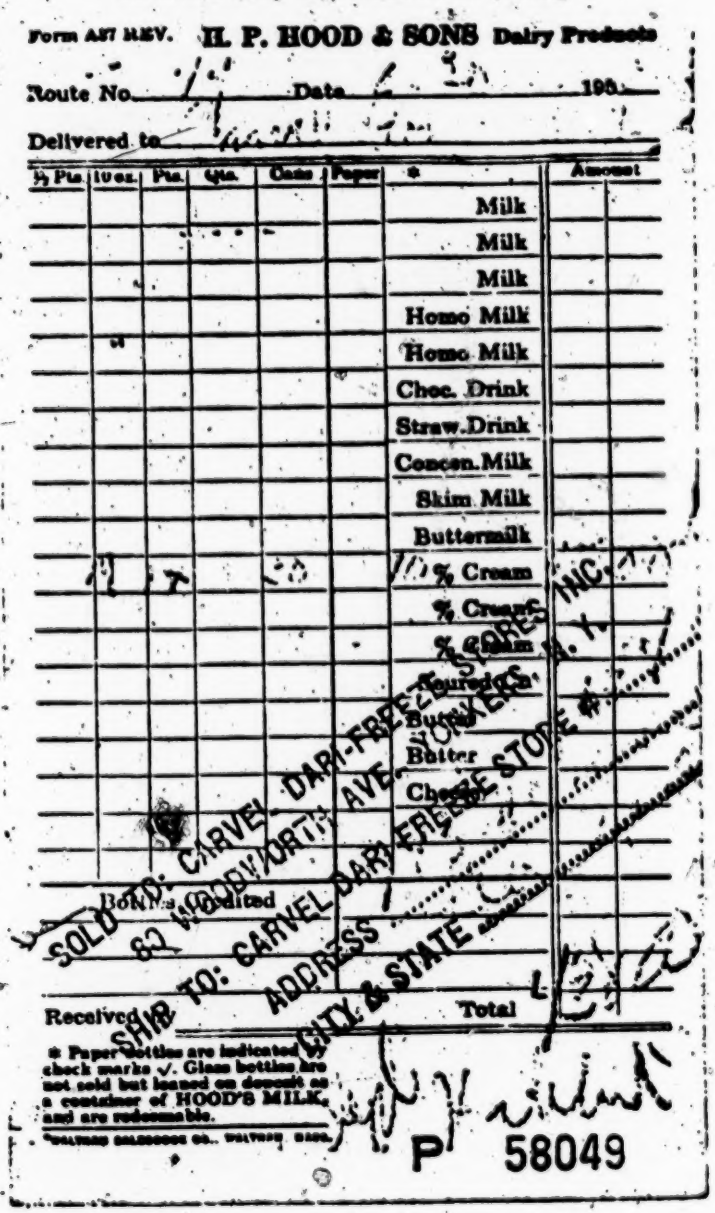
[Form of Tag and Seal prescribed by Carvel for cans of Carvel Special Formula Mix delivered by H. P. Hood & Sons, Inc. for Carvel to Carvel stores.]



DEFENDANT HOOD EXHIBIT H-5

(Received in evidence p. 49c [3554].)

[Representative form of Carvel Invoice used between May 1953 and June 1955.]



Form A37 REV. H. P. HOOD & SONS Dairy Products

Route No. Date 195

Delivered to

½ Pts.	10 oz.	Pts.	Qts.	Cans	Paper	*	Amount
						Milk	
						Milk	
						Milk	
						Homo Milk	
						Homo Milk	
						Choc. Drink	
						Straw. Drink	
						Concen. Milk	
						Skim Milk	
						Buttermilk	
						% Cream	
						% Cream	
						% Cream	
						Reground Cream	
						Butter	
						Butter	
						Cheese	

DEFENDANT HOOD EXHIBIT H-6

(Received in evidence at p. 49c [3554].)

[Representative form of Carvel Invoice used between June 1955 and July 1956.]

SOLD TO: CARVEL DARI FREEZE STORES, INC.
80 Woodworth Avenue, Yonkers, New York

SHIP TO: Carvel Store Number 167 Pawtucket
Darien
Conn. State of

1 2	40 Qt. Cans CARVEL MIX @ $	$69.	25
	Balance Due – Previous Delivery		

RECEIVING RECORD

Total Amount Rec. $
By D. Cannizzaro
Deliveryman

Cans Mix Received
By P. Schweitzer
Signature
Sign Here

YOUR INVOICE & DELIVERY RECEIPT

Manufactured and Delivered by
H. P. HOOD & SONS

STORE OWNER
P. Schweitzer

No. 401
6-17-55

FORM A 1079 [illegible]

DEFENDANT HOOD EXHIBIT H-7

(Received in evidence p. 50c [3556].)

[Representative forms of Carvel Invoices used after July 11, 1956.]

Carvel

STORES OF NEW YORK, INC.
80 WOODWORTH AVE.,
YONKERS, NEW YORK
YOnkers 9-7200

DATE_____

CARVEL STORE NO._____ Nº 6376 HPNNY

ADDRESS _____

TERMS: 2%/ONE DELIVERY

	40 QT. CANS CARVEL MIX @ $		
	ROYALTY @ $2.50 per 10 gal. mix		
	BALANCE DUE - PREVIOUS DELIVERY		

RECEIVING RECORD

TOTAL AMOUNT RECEIVED $_____

BY_____ DELIVERYMAN

_____ CANS MIX RECEIVED

BY_____ SIGNATURE SIGN HERE

YOUR INVOICE & DELIVERY RECEIPT

Carvel

BARI-FREEZE STORES, INC.
80 WOODWORTH AVE.,
YONKERS, NEW YORK
YOnkers 9-7200

DATE_____

CARVEL STORE NO._____ Nº 29176 HPNBF

ADDRESS _____

TERMS: 2%/ONE DELIVERY

	40 QT. CANS CARVEL MIX @ $		
	ROYALTY @ $2.50 per 10 gal. mix		
	BALANCE DUE - PREVIOUS DELIVERY		

RECEIVING RECORD

TOTAL AMOUNT RECEIVED $_____

BY_____ DELIVERYMAN

_____ CANS MIX RECEIVED

BY_____ SIGNATURE SIGN HERE

YOUR INVOICE & DELIVERY RECEIPT

LOCAL LAWS OF WHICH THE DISTRICT COURT WAS REQUESTED TO TAKE JUDICIAL NOTICE

(1) General Laws of Massachusetts, Tit. XV, Chap. 94, §§ 65G-65S

GENERAL LAWS OF MASSACHUSETTS

Title XV, Regulation of Trade

Chapter 94 Inspection of Food, Drugs and Various Articles

§§ 65G to 65S, Frozen Desserts and Frozen Dessert Mix

"§ 65H. *Applications for Licenses and Permits.*—Every person manufacturing within the commonwealth frozen desserts and frozen dessert mix, or either, in this paragraph called products, shall, during the month of February in each year, file with the board of health of each town in which he manufactures, or proposes to manufacture, such products, upon a form prescribed and furnished by the department, an application for a license to manufacture such products in such town, herein and in the eleven following sections called a license, for the year commencing with the following March first, and with the application shall tender the proper fee. Such application shall state that the applicant will manufacture such products only from pure and wholesome ingredients and only under sanitary conditions; shall show the location of each plant in such town at which such products are to be manufactured; and the name of the brand or brands, and the trade or corporation name or names, if any, under which the same are to be sold.

"Every person manufacturing frozen desserts and frozen dessert mix, or either, for the use of his patrons, guests or servants shall, except as hereinafter otherwise provided, obtain a license therefor. The provisions of the preceding

paragraph shall, so far as applicable, apply to licenses issued hereunder.

"If the owner of a plant for the manufacture of frozen desserts and/or frozen dessert mix located without the commonwealth desires to sell his product within the commonwealth he shall apply to the department for a permit to sell within the commonwealth frozen desserts and/or frozen dessert mix, herein and in the eleven following sections called a permit, and with the application shall tender the proper fee. The department may issue to any suitable applicant therefor such a permit if it is satisfied after inspection that the plant named in the application is maintained in accordance with the standards of sanitation prescribed by its rules and regulations. Such permit shall be in lieu of a license referred to in the first paragraph; shall be subject to all sanitary requirements provided for such a license; shall apply only to one such plant; shall be valid throughout the commonwealth; and may be suspended or revoked by the department as provided by section sixty-five J. The department may inspect any plant of an applicant covered by his or its application for a permit. No part of any such fee shall be returned to an applicant whether or not the permit is granted. . . . (1934, 373, § 1); (amended by 1957, 356, § 5, appvd. May 13, 1957; effective 90 days thereafter.)

. . . . . .

"§ 65L. *Certain Sales and Exchanges Prohibited.*

. . . . . .

"(b) No person shall sell or exchange, offer for sale or exchange, or advertise for sale, any frozen dessert and/or frozen dessert mix, if the brand name of the frozen dessert or frozen dessert mix or the label upon it or the advertising accompanying it shall give a false indication of its origin, character, composition or place of manufacture, or is otherwise false or misleading in any particular." (1934, 373, § 1.); (amended by 1957, 356, § 7, appvd. May 13, 1957; effective 90 days thereafter.)

. . . . . .

"§ 65P. *False Labelling.*—(a) No person shall sell or exchange, or offer or expose for sale or exchange, or de-

liver or attempt to deliver, frozen desserts in any container which is falsely labelled as to the name of the manufacturer or place of manufacture, or in any other respect.

(b) No person shall misrepresent in any manner the name of the manufacturer or the place of manufacture of frozen desserts.

(c) No person shall use or cause or permit to be used, for the purpose of preserving or holding frozen desserts, any cabinet, can, container or other equipment owned in whole or in part by any other person, without the written consent of such owner.

(d) No person shall place any frozen desserts of one manufacturer in the cabinet, can, container or other equipment belonging in whole or in part to another manufacturer.

(e) No person, other than the owner or a person thereto authorized by him, shall remove, erase, obliterate, cover or conceal the owner's name or any distinguishing mark or device which may appear to be placed on any such cabinet, can, container or other equipment.

(f) Except where otherwise provided in sections sixty-five G to sixty-five S, inclusive, the provisions of sections one hundred and eighty-six to one hundred and ninety-five, inclusive, shall apply to frozen desserts and to frozen dessert mix, and to any materials intended for use, or used, in the manufacture thereof. (1934, 373, §1); (1937, 341, §3); (Amended by 1957, 356, § 11, appvd. May 13, 1957; effective 90 days thereafter.)"

(2) General Statutes of Connecticut, Chap. 341, Secs. 19-197, 19-202, 19-203

GENERAL STATUTES OF CONNECTICUT

Chapter 341 Pure Food and Drugs

Sec. 19-197

"Sec. 19-197. *Application for license by manufacturer of frozen desserts.* Each manufacturer of frozen desserts and frozen dessert mix for sale shall, during the month of February in each year, file with the commissioner of consumer protection an application for a license, upon a form prescribed by the commissioner. The application shall show the location of each plant at which frozen desserts and frozen dessert mix are to be manufactured and the name of the brand or brands, if any, under which the same are to be sold. The license period shall be for twelve months beginning March first. The license fee shall be based upon the number of gallons manufactured during the previous calendar year. (1949 Rev., S. 3913.); (1959, P.A. 375, S. 1.)"

* * * * * * *

"Sec. 19-202. *Prohibitions as to sale.* No person shall sell, advertise or offer or expose for sale any frozen dessert or frozen dessert mix unless the manufacturer thereof is a licensee under the provisions of section 19-199. No person shall sell, offer for sale or advertise for sale any frozen dessert or frozen dessert mix if the brand name of the frozen dessert or frozen dessert mix or the label upon it or the advertising accompanying it gives a false indication of the origin, character, composition or place of manufacture, or is otherwise false or misleading in any particular. No person shall sell, advertise or offer or expose for sale any imitation ice cream, except special dietary * * * *frozen desserts* containing an artificial sweetening agent or other agents manufactured under regulations provided for under section *19-204a.* (1949 Rev., S. 3918; 1949, S. 2083d.) (1961, P.A. 154, S. 5.) Effective July 1, 1961."

Sec. 19-203. *False labeling of product and illegal use of equipment.* (1) No person shall sell or offer or expose for sale frozen desserts or frozen dessert mix which is falsely labeled as to the name of the manufacturer or place of manufacture, or in any other respect. (2) No person shall misrepresent in any manner the name of the manufacturer or the place of manufacture of frozen desserts or frozen dessert mix. (3) No person shall use or cause or permit to be used, for the purpose of preserving or holding frozen desserts, any cabinet, can, container or other equipment owned by any other person without the written consent of such owner, and all such equipment shall be labeled with the wholesale manufacturer's name and address. (4) No person shall place any frozen dessert of one manufacturer in the cabinet, can, container or other equipment belonging to another manufacturer. (5) No person other than the owner shall remove, erase, obliterate, cover or conceal the owner's name or any distinguishing mark or device on any cabinet, can, container or other equipment. Each wholesaler shall declare on invoices the brand name of all ice cream, frozen desserts or frozen dessert mix delivered by him to retailers, and each retailer shall retain such invoice for inspection by the commissioner of consumer protection for a period of thirty days. Each package or container of ice cream or frozen dessert shall bear the name and address of the manufacturer or, * * * *in lieu of such name and address, the name and address of the packer or distributor, together with the Connecticut license number of such manufacturer, or the name and home address of the manufacturer, together with the Connecticut license number of such manufacturer.* (1949, Rev., S. 3920; 1949, S. 2085d.) (1959 P.A. 311.)"

GENERAL STATUTES OF PENNSYLVANIA

Title 2, Chap. IV, Secs. 403, 404, 406

Section 403. LABELING—(a) Each package or container of ice cream, custard ice cream, french ice cream, frozen custard, ice milk, sherbert, ice, fruit ice, ice milk confections, frozen ice confections or frozen sherbet confections shall be marked with the name of the product and the product

shall conform with the definition or standards thereof. The packages shall bear the name of the manufacturer and the address of the plant thereof. In lieu of the manufacturer's name and address, the name and address of the distributor, preceded or followed by "Distributed By", or "Distributor" may appear. All such packages must also bear "Reg. Penna. Dept. Agr." followed by a code approved by the Secretary. All packages shall bear a statement of the net contents. Where ice cream products are dispensed from bulk or dispensed at the time of manufacture, such information as will clearly advise each purchaser as to the type of product being offered for sale shall be displayed in a conspicuous manner by a sign.

Section 404. Storage Containers—(a) It is unlawful to use any equipment, cabinet, can, or other container belonging to another manufacturer to hold any ice cream, custard ice cream, french ice cream, frozen custard, ice milk, sherbet, ice, fruit ice, ice milk confections, frozen ice confections or frozen sherbet confections not sold or furnished by him.

(b) It shall be unlawful for any person other than the owner to remove identifying marks from such containers.

Section 406. Licenses and Permits—(a) No person shall engage in the preparation of ice cream, custard ice cream, french ice cream, frozen custard, ice milk, sherbet, ice, fruit ice, ice milk confections, frozen ice confections or frozen sherbet confections before an application is made to the Bureau of Foods and Chemistry on forms provided by the Bureau; said application to be accompanied by a fee, according to the following schedule:

100,000 gallons or less	$ 10.00
100,001 gallons to 250,000 gallons	$ 50.00
More than 250,000 gallons	$100.00

and until a license has been received. Initial licenses will not be issued until after approval based on an inspection by an agent of the Bureau. The license should be posted in a conspicuous manner.

[File endorsement omitted]

IN UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 28206

Civil File No. 150-212

BERNARD SUSSER, GERTRUDE SUSSER and SHIRLEY SCHWARTZ,
Plaintiffs-Appellants,

against

CARVEL CORPORATION, CARVEL DARI-FREEZE STORES, INC., CARVEL STORES REALTY CORPORATION, EAGLE CONE CORPORATION, H. P. HOOD & SONS, Defendants-Appellees.

Civil File No. 152-119

LESTER N. MODICK and HARRIET M. MODICK,
Plaintiffs-Appellants,

against

CARVEL STORES OF NEW YORK, INC., CARVEL CORPORATION, CARVEL DARI-FREEZE STORES, INC., EAGLE CONE CORPORATION, H. P. HOOD & SONS, Defendants-Appellees.

Civil File No. 152-120

MARTHA M. McCOY and FRANK T. McCOY,
Plaintiffs-Appellants,

against

CARVEL CORPORATION, CARVEL DARI-FREEZE STORES, INC., CARVEL STORES REALTY CORPORATION, EAGLE CONE CORPORATION, H. P. HOOD & SONS, Defendants-Appellees.

Civil File No. 153-193

JAMES OSSOLA and ELIZABETH G. OSSOLA,
Plaintiffs-Appellants,

against

CARVEL STORES OF NEW YORK, INC., CARVEL DARI-FREEZE STORES, INC., CARVEL STORES REALTY CORPORATION, EAGLE CONE CORPORATION, H. P. HOOD & SONS, Defendants-Appellees.

Civil File No. 60 Civil 63

JAMES P. PIERCE, RITA PIERCE, LYLE FREDERICK, LEROY M. FREDERICK, ALFRED MUELLER and SOL RODENS, Plaintiffs-Appellants,

against

CARVEL STORES OF NEW YORK, INC., CARVEL DARI-FREEZE STORES, INC., CARVEL CORPORATION, CARVEL STORES OF PENNSYLVANIA, INC., CHAIN LOCATIONS OF AMERICA, INC., RAKESTRAW'S DAIRY PRODUCTS, INC., Defendants-Appellees.

Civil File No. 153-194

JOSEPH P. PHELAN, Plaintiff-Appellant,

against

CARVEL STORES OF NEW YORK, INC., CARVEL DARI-FREEZE STORES, INC., CARVEL STORES REALTY CORPORATION, EAGLE CONE CORPORATION, H. P. HOOD & SONS, Defendants-Appellees.

Civil File No. 60 Civil 1096

MATTHEW SEU and JANE L. SEU, Plaintiffs-Appellants,

against

CARVEL CO. ORATION, CARVEL STORES OF NEW YORK, INC., CARVEL DARI-FREEZE STORES, INC., CARVEL STORES REALTY CORPORATION, EAGLE CONE CORPORATION, H. P. HOOD & SONS, Defendants-Appellees.

Civil File No. 60 Civil 1990

PAUL S. GIBERMAN and GERTRUDE GIBERMAN,
Plaintiffs-Appellants,

against

CARVEL STORES OF NEW YORK, INC., CARVEL DARI-FREEZE STORES, INC., CARVEHICLE CORP., CARVEL CORPORATION, CARVEL STORES OF PENNSYLVANIA, INC., CHAIN LOCATIONS OF AMERICA, INC., RAKESTRAW'S DAIRY PRODUCTS, INC., Defendants-Appellees.

Civil File No. 60 Civil 2042

JOSEPH PAZDRO and YOLANDA PAZDRO, Plaintiffs-Appellants,

against

CARVEL STORES OF NEW YORK, INC., CARVEL DARI-FREEZE STORES, INC., CARVEL CORPORATION, CARVEL STORES OF PENNSYLVANIA, INC., CHAIN LOCATIONS OF AMERICA, INC., RAKESTRAW'S DAIRY PRODUCTS, INC., Defendants-Appellees.

Appendix for Defendant-Appellee Rakestraw's Dairy Products, Inc.

EXCERPT FROM PLAINTIFF'S EXHIBIT 15

[Exhibit 15 consists of three contracts entered into by Rakestraw and three of the Carvel defendants. One of these contracts—the agreement dated May 14, 1956 between Rakestraw and Carvel Stores of New York, Inc.—is here reproduced in full.]

7c
3/23/56

AGREEMENT, made this 14th day of May 1956, by and between Carvel Stores of New York, Inc. a corporation of the State of New York, with offices at 80 Woodworth Avenue, Yonkers, New York, (hereinafter referred to as

"Carvel"), and Rakestraw's Dairy Products, Inc., a corporation of the State of Pennsylvania, with principal offices at 17 East Coover Street in the City of Mechanicsburg, State of Pennsylvania (hereinafter referred to as "Processor").

WITNESSETH:

WHEREAS, Carvel has perfected and is the owner of a certain secret formula for the manufacture of ice cream mix used in the production of Carvel Ice Cream which is sold exclusively at Carvel Dari-Freeze Stores, (said mix being hereinafter referred to as "Carvel Mix"); and

WHEREAS, it is the desire of the parties hereto that the Processor manufacture Carvel Mix and sell the same only to Carvel, and deliver said Carvel Mix to the Carvel Dari-Freeze Stores (Hereinafter referred to as "Carvel Stores") in the area hereinafter described, upon the terms and conditions hereinafter set forth; and

WHEREAS, the Processor acknowledges that the said secret formula is of substantial value, and is the property of Carvel, and that the terms, conditions and covenants hereinafter contained are equitable and necessary for the protection of the said secret formula, and to insure the uniform quality and appearance of Carvel's Frozen Dairy Product made from said Carvel Mix;

NOW, THEREFORE, in consideration of the foregoing recitals and of the mutual covenants hereinafter contained, it is agreed as follows:

Manufacture of Carvel Mix

1. The Processor agrees to manufacture as much Carvel Mix as may be required by the various Carvel dealers located in the area set forth in Appendix A (hereinafter referred to as "Area") for the operation of their respective Carvel Stores, and sell the same to Carvel, and Carvel hereby agrees to purchase all its requirements of Carvel Mix in said Area only from the Processor.

Secret Formula

2. The Processor shall manufacture the Carvel Mix in accordance with the secret formula which shall be furnished to the Processor by Carvel on or prior to the execution of this agreement. Said formula shall be initialled by both parties and kept in a safe place, so that it shall not be disclosed to any but authorized employees of the Processor and Carvel. Said Carvel Mix shall be manufactured at the Processor's Plant at Mechanicsburg, Pennsylvania and in no other place.

Ingredients; Batch Reports

3. In connection with the manufacture of Carvel Mix, the Processor shall comply with the following, among other conditions.

(a) Only Carvel Stabilizer and Carvel Emulsifier shall be used, which Carvel agrees to supply to the Processor at such prices as shall from time to time be in effect.

(b) For the other ingredients set forth in the formula, only materials of the highest quality shall be used. Carvel Mix, when packed in ten (10) gallon cans, shall have a minimum weight of 92 pounds (exclusive of the weight of the can).

(c) For the State of Pennsylvania & New Jersey the Carvel Mix shall have at least a ten (10%) percent butter fat content.

(d) The Processor shall strictly observe all requirements of all Federal, State and local laws and regulations pertaining to the manufacture or delivery of ice cream mix, effective in the respective areas in which the Carvel mix shall be delivered or manufactured by the Processor in accordance with this agreement.

(e) The Processor shall manufacture the Carvel Mix in batches. After the completion of each batch, a batch report shall be promptly prepared, at the cost and expense of the

Processor, by a duly licensed analyzing chemist. A copy of the batch report shall be mailed to Carvel within twenty-four (24) hours after the preparation of each batch.

Packing and Labeling of Carvel Mix

4. (a) The Carvel Mix shall be packed in sanitary ten (10) gallon cans, free and clean of any rust spots. All such cans shall be wired and sealed on both handles of the can, at the Processor's plant.

(b) The Carvel Mix shall be labeled at the Processor's plant with the Carvel Special Formula tag which shall bear the date of manufacture. Said tags shall have such inscription as may be from time to time prescribed by Carvel, which tags shall comply with applicable legal requirements.

Delivery of Carvel Mix

5. (a) Carvel Dealers in the Area may transmit orders directly to the Processor for their requirements of Carvel Mix. The Processor shall fill said orders promptly and deliver the same to the respective Carvel Stores as soon as possible.

(b) The Processor shall transport and deliver the Carvel Mix to the respective Carvel Stores, pursuant to orders received as aforesaid, in suitable trucks operated by the Processor, which shall not be used for any other purpose. Said trucks shall be painted all white at the Processor's expense and be identified with Carvel's insignia at the cost and expense of the Processor. Identification insignia shall be supplied by Carvel at its own cost and expense.

(c) The Processor shall procure a delivery receipt for each delivery made and send same to Carvel.

(d) Prior to the fifth business day of each month, the delivery agent shall submit to Carvel, a Statement of the total cans of Carvel Special Formula Mix delivered to each store during the previous month.

(e) The Processor will not itself represent, or permit any of its employees to represent that the Processor or any of its employees are the representatives of Carvel, and will indemnify and hold Carvel and its affiliates free and harmless from any liability which may be incurred by any act of any such person in violation of the terms of this paragraph; without limiting the generality of the foregoing, the Processor shall save Carvel free and harmless from any liability for damage to person or property caused by the act of any route man or delivery man driving one of the trucks marked with Carvel's insignia, as aforementioned.

(f) The Processor agrees that he will deliver only Carvel Mix to Carvel Stores, and no other ice cream mix or ice cream preparation of any kind.

(g) It is understood and agreed that the Processor's obligation to manufacture and supply Carvel Mix, as set forth in this agreement, shall at all times be subject to delays that may be due to strikes, acts of God, official embargoes, or wartime restrictions.

Invoices

6. All Carvel Mix purchased by any Carvel Store shall be sold in the name of Carvel and invoiced by the Processor on Carvel forms directly to the Carvel Stores ordering same, at such price as shall be fixed from time to time by Carvel. The invoices to be used shall be in the form as per sample invoice annexed hereto, or on such other forms as may hereafter be specified by Carvel, and shall be printed at the expense of Carvel. The original invoice shall be delivered to each Carvel Store at the time of delivery of the Carvel Mix and the duplicate and triplicate copies of the invoice shall be mailed directly to Carvel at 80 Woodworth Avenue, Yonkers, New York.

Credit and Collection

7. (a) The first shipment of Carvel Mix to any one of the Carvel Stores shall be on open account. On the second shipment of Carvel Mix to any one of the Carvel

Stores, the Processor shall, on behalf of Carvel, collect the purchase price for the said first shipment, payable by the respective Carvel dealer, and on all subsequent shipments, the Processor shall collect payment for the preceding shipment; it being intended that at no time shall the Processor make any additional shipment of Carvel Mix until the previous shipment has been paid for.

(b) The maximum amount of Carvel Mix which may be delivered to any one Carvel Store during any one week on open account, chargeable to Carvel, shall be in the sum of $500.00, except if otherwise authorized in writing by Carvel. The Processor shall notify Carvel of any delinquency in payment on the part of any Carvel Store. The Processor shall, if requested by Carvel, make shipments on a C.O.D. basis only, to such of the Carvel Stores as may be designated by it.

(c) Upon request of Carvel, the Processor shall also, without additional expense to Carvel, collect any royalties on Carvel Mix due to Carvel from the Carvel Stores.

(d) All collections shall be deposited by the Processor in a special bank account to be opened in the name of Carvel, in a bank approved by it, on which account only Carvel and an authorized executive officer of the processor shall be authorized to withdraw funds. All checks shall be endorsed with a rubber stamp to be furnished by Carvel showing the endorsement to be solely for the purpose of deposit in said account. A copy of each deposit slip shall be mailed to Carvel as soon as each deposit is made, together with a schedule, setting forth the collections covered by said deposit, including list of Carvel Stores, quantities, dates of shipment, and invoice number.

Price

8. (a) The price to be paid to the Processor for manufacturing the Carvel Mix shall be

(1) the actual cost to it of all ingredients prescribed in the formula used in the manufacture of the Carvel Mix, plus

(2) 17½% thereof to cover its labor, overhead and profit.

(b) The price to be paid to the Processor for delivery of Carvel Mix to Carvel Stores, billing, collections of Payment, maintenance of insurance and all other services to be rendered by the Processor hereunder shall be the sum of $.50 per 10 gallon can of Carvel Mix actually delivered as aforesaid.

(c) Bills shall be rendered weekly for all shipments made during the prior week. Said price, computed as aforesaid, shall be the fixed price until changed as hereinafter provided.

(d) A certificate of an executive office of the Processor, certifying to the actual cost of the ingredients prescribed in the formula, shall be furnished to Carvel on the tenth day of each month. If the cost price of the ingredients used in the manufacture of the Carvel Mix has either increased or decreased as at the tenth day of any month, the price to be charged to Carvel for manufacturing Carvel Mix shall be adjusted accordingly. Notice of such price change shall be sent to Carvel on the tenth day of such month, and shall become effective on the fifteenth day of such month, it being the intention of the parties that the prices shall remain fixed for periods of at least one month (that is, from the 15th day of any month to the 15th day of the following month), and thereafter until changed in accordance with the procedure hereinabove set forth.

Insurance

9. (a) During the entire term of this agreement, the Processor agrees to provide, at its own cost and expense, Public Liability Insurance in the amount of $100/300,000 for injury, and $10,000 for property damage, on the trucks referred to above, payment of claims to be made to the Processor and Carvel, as their respective interests may appear.

(b) The Processor agrees to obtain Products Liability Insurance in the amount of $100/300,000, covering the Carvel Mix manufactured by the Processor and delivered to the Carvel Stores, payment of claims to be made in the same manner as payment under the Public Liability Insurance Policy.

(c) The Processor agrees to obtain a bond covering all persons authorized by it to deliver Carvel Mix to Carvel Stores and/or to make collections for Carvel Mix sold to them. Said Bond shall be in the sum of $25,000.00.

(d) All of said insurance policies and bond shall be obtained from an insurance or surety company or companies reasonably satisfactory to Carvel. The Processor shall promptly furnish to Carvel a copy of said policies and bond, and certificates of insurance, to be mailed to Carvel at the address first hereinabove written.

(e) In the event that the Processor fails to furnish the bond and insurance policies aforesaid within ten (10) days after this agreement has been executed, Carvel shall have the right, but not the obligation, to obtain the same and charge the expense thereof to the Processor.

(f) The Processor further agrees to save Carvel and its affiliates free and harmless from any claims that may be made for personal injuries or damages, beyond the coverage of said insurance policies, and to assume any liability imposed by law or incurred by Carvel by reason of the fault or negligence of the Processor.

Inspection

10. Authorized employees of Carvel shall have the right (but not the obligation), at any and all reasonable business hours of the day, to enter and inspect the plant of the Processor manufacturing Carvel Mix and the distributing depots of the Processor, if any, and shall also have the right (but not the obligation) to inspect all materials, machines and equipment used in conjunction with the manufacture of the Carvel Mix, wherever located. The Processor

shall follow all reasonable recommendations which Carvel may make regarding the manufacture of Carvel Mix.

Unsatisfactory Mix

11. Carvel may return any Carvel Mix delivered in unsanitary cans or any mix that, in its reasonable opinion of authorized personnel, does not conform to the formula for Carvel Mix herein referred to, or in the manufacture of which materials of inferior quality have been used. Carvel may refuse to accept further deliveries until the Processor has demonstrated to Carvel that it has taken any appropriate action to prevent the reoccurrence of any such deficiency.

Carvel Mix Formula to Be Kept Secret

12. The Processor agrees that it will not reveal, divulge or make known, or permit to be revealed, divulged or made known either directly or indirectly, the secret Carvel Mix formula or the process, manner of manufacturing, compounding or preparing said Carvel Mix, or any other pertinent knowledge or information concerning the foregoing to any person, firm or corporation during the life of this agreement or at any time after its expiration or earlier termination, excepting only that the processor may furnish information required by law to such Federal, State, or Local authorities as may be entitled to the same. The Processor further agrees that it will not manufacture, or represent that it can or will manufacture, the Carvel Mix for sale to any person, firm or corporation, other than Carvel or its designated Carvel stores. This clause is to survive the expiration or earlier termination of this agreement. The Processor agrees, that in view of its importance for Carvel's business, Carvel may enforce any violation of this clause by an injunction *pendtente lite*, or other equitable proceeding, in addition to any remedy at law.

Term of Agreement

13. (a) The term of this agreement shall be for a period of one (1) year, beginning of the 15th day of May, 1956, provided, however, that either party may cancel and terminate this agreement upon ten (10) days' written notice by registered mail to that effect.

(b) Upon the expiration or earlier termination of this agreement, the Processor

(1) Shall collect any sum due and owing by Carvel dealers for Carvel Mix delivered pursuant to this agreement, and pay the same to the Carvel account in the manner aforesaid.

(2) shall return promptly all invoice forms, delivery receipt forms, tags and any other materials that may belong to Carvel.

(3) shall return the secret formula, and agrees not to make or keep any copies thereof, except as may be contained in such records as the Processor may be required by law to maintain.

(4) shall cause the removal of the Carvel insignia from the delivery trucks and any other object belonging to the Processor to which it may have been affixed, at the Processor's expense.

Assignment; Waiver; Notice Titles; Applicable Law

14. (a) This agreement may not be assigned by the Processor, but may be assigned by Carvel to its successors and assigns.

(b) No provision of this agreement may be waived except in writing. A failure to enforce, or waiver in one particular instance of, any of its provisions shall not be deemed a continuing waiver.

(c) All notices required by this agreement shall be in writing and mailed to the addresses first hereinabove written, unless the respective parties shall otherwise advise.

(d) The titles of the various paragraphs of this agreement are inserted for reference only, and do not define, limit or describe the scope or intent of any of its provisions.

(e) This instrument contains the entire agreement of the parties. It was made in the State of New York, and shall be construed pursuant to the laws thereof. It cannot be changed or terminated orally.

IN WITNESS WHEREOF, the corporate parties hereto have caused their names and seals to be properly affixed by a duly authorized officer the day and year first above written.

By .....(Seal)

Witness:

.....

Title .....

By .....(Seal)

Witness:

.....

Title .....

EXHIBIT "A"

Stores serviced by Rakestraw Dairy Products, Inc. under Carvel Stores of New York, Inc.

32
41
101
166
231
243
248
256
149

CUSTOMER'S COPY.

SALES CONTRACT

SC 03533

Carvel

STORES OF PENNSYLVANIA, INC.
FRANCHISE DIVISION

80 Woodworth Avenue
Yonkers, New York

Purchaser La Roy M. Frederick, 16th Maple Avenue, Haddon Heights, New Jersey Date February 11, 1953

Address and Lyle Frederick, Rd. #1, Schwenkfill Haven, Pennsylvania

Ship To S/E. Corner Penna. State Highways Route Nos. 160 & 662, Shoemakersville, Pennsylvania Ship Via Our Truck

Financed for period of 36 months

Cash With Order $ 7500.00 Balance $ 10,000.00 Terms: at 6% per annum

QUAN	DESCRIPTION	PRICE
2	DFR-52 Freezers, with self contained compressor, 3 phase, 60 cy. 120/230 V. Gas Charged.	
1	300 Gallon Mix Storage Box, 6x6x6 wood construction with a 1/2 H.P. compressor with a 1/6 H.P. blower complete	
1	Carvel cabinet, 8 hole low temperature refrigerated with four (4) superstructure, superstemature with a formica counter 2-3 dimential photos complete with a 1/4 H.P. compressor.	
2	Stainless Steel Pails.	
1	Drink Fountain Refrigerated electric - 110 volts.	
1	Multi Malt Mixer complete (5 spindle) electric 110 volts.	
1	Fudge warmer electric - 110 volts.	
4	Torpedo "Carvel" outside receptacles	
1	Stainless Steel ladle	
3	Stainless Steel Front Draw Buckets for machines	
1	Cash Register "As Is" rebuilt	
2	Rubbish Burners for outside use.	
2	Scoop	
1	Stainless Steel Front Counter	
1	Complete package of opening day advertising promotional program.	
1	Malt Dispenser #4721995-B	
	Total Purchase Price	17,500 00

The above equipment sold subject to condition that all electrical work and plumbing must be furnished by the customer.

Our commitments are subject to the following: Delay or failure of performance on our part shall be excused if our normal manufacturing operations are affected or prevented by strikes, lockouts, Act of God, Acts of the Government, civil or military authorities, material shortages, delays of public carriers, fire, theft, accident, or any cause beyond our control. We assume no responsibility for damage on account thereof. Items listed above remain the property of seller until fully paid.

All warranties and guarantees are extended to purchaser as received by us from manufacturers of motors, compressors and other such equipment.

Should any part or parts of this machine, during the period of one year from date of purchase, be proven to the satisfaction of the Carvel [redacted], New York City, to be defective, the Carvel [redacted] upon hereby guarantee to replace free of charge, F.O.B. New York City, any such part or parts of equipment designated herein (ordinary wear, accident and misuse excepted) but such guarantee shall be null and void where such part or parts or labor required are not procurable by reason of Acts of the U. S. Government or sub-divisions or agencies thereof. The Carvel [redacted] shall not be liable for repairs or replacements made by buyer without its written consent, nor for damage, delays and losses, consequential or otherwise caused by defects. Its liability being expressly limited to replacement parts.

All orders are subject to acceptance by a member of the Carvel [redacted]

The Carvel [redacted] reserves the right to change or revise its standards in connection with any feature of its product with the idea of improving our freezers from time to time as in our judgment may be necessary or advisable. In case of such changes of standards, neither we, nor our distributors or dealers, shall be obligated to make corresponding changes, improvements, additions or replacements to care for equipment previously sold or shipped.

The Carvel [redacted] reserves the right to change or revise prices on any of its models.

Purchaser acknowledges receipt of a full, true and correct copy of this contract.

STORES OF PENNSYLVANIA, INC.

Accepted CARVEL [redacted]

By George P. Clark

La Roy M. Frederick — Purchaser

Lyle M. Frederick — Purchaser

_____ Purchaser

The above Franchise Store Equipment package is sold pursuant to Franchise Agreement Contract No. 000350 dated February 11, 1953.

It is specifically understood and agreed that the above equipment is sold subject to Franchise Contract entered into and between Carvel Stores of Pennsylvania, Inc. and the purchaser and to be used only in conjunction with franchise contract signed for the above location designated by shipped to.

It is understood that the chattels and personalties above mentioned are being supplied to the purchaser through Carvel Corporation and to provide all terms of purchase as herein provided.

CARVEL STORES OF PENNSILVANIA, INC.

George Clark

George Clark, Vice President.

Irene Frederick

LeRoy M. Frederick

Lyle M. Frederick

PLAINTIFFS' EXHIBIT 16

AGREE & MARCIANTE
COUNSELORS AT LAW

PHILIP AGREE
ARTHUR E. MARCIANTE, JR.

YONKERS 9-6700

10 BABCOCK PLACE
YONKERS, N. Y.

CERTIFIED MAIL #86
RETURN RECEIPT REQUESTED

MAY 1, 1959

GOLD MEDAL PRODUCTS
318 EAST 3RD STREET
CINCINNATI 2, OHIO

ATTENTION: OFFICE OF THE PRESIDENT

GENTLEMEN:

WE ARE THE ATTORNEYS FOR CARVEL STORES OF NEW YORK INC., CARVEL DARI-FREEZE STORES INC. AND CARVEL STORES OF PENNSYLVANIA INC. WE HAVE BEEN INFORMED BY OUR CLIENTS THAT SALES REPRESENTATIVES OF YOUR FIRM HAVE CONTACTED VARIOUS DEALERS AND SUGGESTED THAT THEY USE CERTAIN "NON-DAIRY" ITEMS INCLUDING POPCORN, CONES, FRANKFURTERS, SOFT DRINKS ETC. AND IN CONNECTION THEREWITH HAVE SOLICITED ORDERS FOR VARIOUS ITEMS OF EQUIPMENT AND PAPER GOODS FOR USE IN THEIR STORES. THESE SOLICITATIONS, AND ANY ORDERS RECEIVED THEREBY, WOULD CONSTITUTE A SUBSTANTIAL INTERFERENCE WITH THE CONTRACTIONAL RELATIONSHIPS EXISTING BETWEEN THE VARIOUS CARVEL CORPERATIONS AND THE MANY FRANCHISE CARVEL DEALERS, AND WOULD ALSO INTERFERE WITH IMPORTANT TRADEMARK RIGHTS.

IT MAY BE THAT YOU ARE NOT PRESENTLY AWARE OF THE NATURE OF THE RELATIONSHIP BETWEEN CARVEL AND ITS FRANCHISED DEALERS. WE BRING THE FOLLOWING TO YOUR ATTENTION. CARVEL PRODUCTS ARE SOLD UNDER REGISTERED TRADEMARKS, ARE OF UNIFORM HIGH QUALITY AND ARE KNOWN AS AND RELIED UPON BY THE PUBLIC TO BE PRODUCTS COMPOSED OF CARVEL INGREDIENTS EXCLUSIVELY, INCLUDING TOPPINGS, SYRUPS, MALTS, ETC. FURTHERMORE, ALL FRANCHISED CARVEL DEALERS HAVE BY CONTRACT EXPRESSLY AGREED TO PURCHASE AND USE ONLY CARVEL TOPPINGS, SYRUPS, MALTS AND OTHER INGREDIENTS, AVAILABLE ONLY FROM CARVEL AUTHORIZED SOURCES. ALL OF THESE CARVEL INGREDIENTS ARE SPECIAL FORMULA PRODUCTS.

IN ADDITION FRANCHISED CARVEL DEALERS BY THEIR FRANCHISE AGREEMENTS AGREE TO SELL AT THEIR CARVEL STORES CARVEL FROZEN DAIRY PRODUCTS SOLELY AND ARE NOT AUTHORIZED OR ENFRANCHISED TO DEAL WITH ANY PRODUCT EXCEPT CARVEL FROZEN DAIRY PRODUCTS.

IN ADDITION THE FRANCHISED CARVEL DEALER MUST USE EQUIPMENT WHICH MEETS THE STANDARDS AND REQUIREMENTS SET BY CARVEL AND PAPER GOODS WHICH ALSO MEET THE STANDARDS AND REQUIREMENTS SET BY CARVEL. SUCH EQUIPMENT AND PAPER GOODS MUST BE AUTHORIZED BY CARVEL.

THE INSTIGATION TO USE IN A CARVEL STORE OF NON-CARVEL PRODUCTS OR INGREDIENTS OR THE SALE AND DELIVERY TO CARVEL DEALERS OF UNAUTHORIZED EQUIPMENT OR PAPER GOODS, WITHOUT THE PRIOR APPROVAL AND AUTHORIZATION OF THE FRANCHISOR CARVEL CORPORATION, SHOULD BEAR THE FOLLOWING RESULTS:

1. INTERFERENCE WITH THE FULFILLMENT OF CONTRACTS BETWEEN CARVEL AND ITS CARVEL FRANCHISED DEALERS.

2. CAUSE A MISREPRESENTATION AMONGST THE BUYING PUBLIC AS TO THE SALE OF A PRODUCT UNDER THE CARVEL NAME AND TRADEMARK, WHICH IS NOT, IN FACT, A CARVEL PRODUCT IN ACCORDANCE WITH CARVEL STANDARDS AND INGREDIENTS.

3. CAUSE, AID AND ABET THE INFRINGEMENT AND UNAUTHORIZED USE OF VALUABLE TRADEMARKS.

EACH AND ALL OF THE ABOVE WOULD RESULT IN SUBSTANTIAL DAMAGE TO CARVEL, EACH OF THE CARVEL FRANCHISED DEALERS, AND TO THE GENERAL PUBLIC. FOR THIS REASON, THIS NOTICE ADVISING YOU OF THE IMPORTANT MATTER INVOLVED AND FIRMLY REQUESTING YOUR COOPERATION IS BEING SENT FOR THE RECORD. BECAUSE OF THE SUBSTANTIAL RIGHTS INVOLVED, OUR CLIENT WOULD FEEL OBLIGED TO TAKE ALL STEPS NECESSARY TO PROTECT THEIR INTEREST AND THE INTERESTS OF THE FRANCHISED DEALERS AND THE GENERAL PUBLIC, AND WILL NOT HESITATE TO ENFORCE ALL OF THEIR RIGHTS, BY ALL LEGAL AND EQUITABLE RELIEF AVAILABLE, AS WELL AS ASSERTING IN FULL ANY AND ALL CLAIMS FOR DAMAGES.

ALTHOUGH THIS LETTER IS WRITTEN IN FIRM AND CLEAR TERMS, IT IS, NEVERTHELESS, WRITTEN IN A SPIRIT OF COOPERATION AND THE DESIRE TO PREVENT MISUNDERSTANDINGS AND POSSIBLE EMBARRASSMENTS. WE MUST EARNESTLY REQUEST YOUR COOPERATION IN THIS MATTER, AND WILL APPRECIATE ACKNOWLEDGEMENT OF THE RECEIPT OF THIS LETTER, AND SOME WORD OR ASSURANCE OF YOUR COOPERATION AND UNDERSTANDING THEREOF.

VERY TRULY YOURS,

ABREE & MARCIANTE

PHILIP ABREE

PA:JV

PLAINTIFFS' EXHIBIT 17

PHILIP AGREE
ARTHUR E. MARCIANTE, JR.

10 BARRON PLACE
YONKERS, N. Y.

May 11th, 1959

Gold Medal Products Co.
318 East Third Street
Cincinnati 2, Ohio

Attention: D. B. Evans

Dear Mr. Evans:

Thank you for your letter dated May 8th, 1959, which I have forwarded to our clients in the Carvel Organization. I am sure that they will give full and fair consideration to the sales message which you have set forth, and I am further sure that they will reply to you with regard to it.

In the meantime, I am sure that you can understand the importance of protecting valuable trademark rights. In the case of a trademark as valuable as CARVEL, this inevitably involves the product itself, its ingredients and the methods, techniques and systems by which it is distributed by franchised Dealers.

We would appreciate it if you could advise your own distributors throughout the Country as to the matters involved in a Carvel Franchise, as they are set out in my letter of May 1st, 1959. We sincerely believe that this would be to the best interests and protection of all of the parties concerned.

Thank you for your cooperation in this matter.

Very truly yours,

AGREE & MARCIANTE

Philip Agree

PA:dd

PLAINTIFFS' EXHIBIT 18

AGREE & MARCIANTE
COUNSELORS AT LAW

PHILIP AGREE
ARTHUR E. MARCIANTE JR.
NORMAN S. HEBB

YONKERS 9-6700

19 BABCOCK PLACE
YONKERS, N. Y.

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

June 15, 1959

National Biscuit Company
425 Park Avenue
New York, New York

Attn: Office of the President

Gentlemen:

As attorneys for Carvel Stores of New York, Inc., we have been informed by our client that sales representatives of your firm have solicited orders for ice cream cones and sold the same to certain Carvel Stores, for use in preparation of Carvel ice cream products. These solicitations and sales constitute a substantial interference with the contractual relationships existing between Carvel and the many franchised Carvel Dealers, and also interfere with our client's important trademark rights.

You may not presently be aware of the nature of the relationship between Carvel and its Franchised Dealers. We bring the following to your attention. Carvel ice cream products are sold under registered trademarks, are of uniform high quality, and are known as and relied upon by the public to be products composed of Carvel ingredients throughout, including ice cream cones.

Furthermore, all Franchised Carvel Dealers have by contract expressly agreed to purchase and use only Carvel cones and other Carvel items as part of the end product that is offered for consumption to the retail purchaser, which are available only from Carvel authorized sources.

The sale and delivery to Carvel Dealers of unauthorized ingredients, cones, crackers, and condiments by a biscuit or supply company, without prior approval and authorization of Carvel, bears the following results:

1. Interference with the fulfillment of contracts between Carvel and its Carvel Franchised Dealers.

2. Cause a misrepresentation amongst the buying public as to the ingredients of a product sold under the Carvel name and trademark, which is not, in fact, a Carvel product consisting of Carvel ingredients throughout in accordance with Carvel standards.

3. Cause, aid and abet the infringement and unauthorized use of valuable trademarks.

Each and all of the above would result in substantial damage to Carvel, each of the many Carvel Franchised Dealers, and to the general public. For this reason, this notice advising you of the important matters involved and firmly requesting your cooperation is being sent for the record. Because of the substantial rights involved, you can well understand that our client feels obligated to take all steps necessary to protect its interests and the interests of the many Franchised Dealers and the general public, and will not hesitate to enforce its rights, by all legal and equitable relief available, as well as asserting in full any and all claims for damages.

Although this letter is written in firm and clear terms, it is, nevertheless, written in a spirit of cooperation and the desire to prevent misunderstandings and possible unpleasantness. We must earnestly request your cooperation in this matter, and will appreciate acknowledgment of the receipt of this letter, and some word or assurance of your cooperation and understanding thereof.

Very truly yours,

AGREE & MARCIANTE

Norman S. Isko

NSI:sp

PLAINTIFFS' EXHIBIT 19

DECEMBER 12, 1957

SPECIAL DELIVERY
REGISTERED MAIL
RETURN RECEIPT REQUESTED

DAIRYMEN'S LEAGUE COOPERATIVE ASSOCIATION, INC.
100 PARK AVENUE
NEW YORK, N. Y.

ATTENTION: OFFICE OF THE PRESIDENT

GENTLEMEN:-

WE ARE THE ATTORNEYS FOR CARVEL STORES OF NEW YORK, INC., CARVEL DARI-FREEZE STORES, INC., AND CARVEL STORES OF PENNSYLVANIA, INC.

OUR CLIENTS HAVE BEEN DEEPLY DISTURBED BY CERTAIN EVIDENCE THAT MIX COMPANIES NOT AUTHORIZED TO DO SO HAVE BEEN SELLING, DELIVERING, AND SOLICITING ORDERS FOR AN UNAPPROVED AND UNAUTHORIZED ICE CREAM MIX FROM A NUMBER OF CARVEL STORES. THIS LETTER DOES NOT IN ANY WAY SUGGEST THAT YOU HAVE BEEN DOING THIS, BUT IS WRITTEN FOR THE PURPOSE OF FIRMLY REQUESTING THAT AT NO TIME DO YOU DO SO, AND FURTHER TO GIVE NOTICE THAT SUCH METHODS AND PROCEDURES WOULD CAUSE SERIOUS AND SUBSTANTIAL INTERFERENCE WITH THE CONTRACTUAL RELATIONSHIP BETWEEN CARVEL AND ITS FRANCHISED DEALERS, AND WOULD ALSO INTERFERE WITH OTHER SUBSTANTIAL RIGHTS OF CARVEL.

WE UNDERSTAND THAT THE MAJORITY OF DAIRIES THAT SELL MIX ARE AWARE OF THE NATURE OF THE RELATIONSHIP OF CARVEL AND ITS FRANCHISED DEALERS, AND ALSO KNOW THAT CARVEL PRODUCTS ARE SOLD UNDER REGISTERED TRADE MARKS AND ARE UNIFORM HIGH-QUALITY PRODUCTS WHICH THE PUBLIC HASCOME TO ACCEPT AS SUCH. SUCH CARVEL FROZEN DAIRY PRODUCTS ARE KNOWN TO THE PUBLIC TO BE, AND ARE RELIED UPON BY THEM, AS BEING PRODUCTS OF A SPECIAL FORMULA ICE CREAM MIX USED ONLY IN CARVEL PRODUCTS. THE FRANCHISED DEALERS' CONTRACT WITH CARVEL HAS AMONG OTHER THINGS, FOR THE PROTECTION OF THE PRODUCT AND THE PUBLIC, THE REQUIREMENT THAT THE SAID DEALERS USE AND SELL ONLY CARVEL FROZEN DAIRY PRODUCTS AS PRODUCED FROM CARVEL SPECIAL FORMULA ICE CREAM MIX PURCHASED FROM AUTHORIZED SOURCES.

THE ACTION OF ANY DAIRY IN THE SALE AND DELIVERY TO CARVEL STORES OF UNAUTHORIZED ICE CREAM MIX AND THE SOLICITATION OF ORDERS THEREFORE, RESULTS IN THE FOLLOWING:

1. IT CAUSES, AIDS AND ABETS THE INTERFERENCE WITH THE FULFILLMENT OF THE CONTRACT BETWEEN CARVEL AND ITS FRANCHISED DEALER, AND THE TERMS THEREOF.

CARVEL'S LEAGUE COOPERATIVE ASSOCIATION

-2-

2. IT CAUSES, AIDS AND ABETS PARTICULARLY, AND IN ADDITION TO ALL OTHER BREACHES, THE BREACH OF THE REQUIREMENTS IN THE DEALER'S FRANCHISE AGREEMENT TO PAY ROYALTIES.

3. IT CAUSES, AIDS AND ABETS IN THE BREACH OF THE TERMS AND OBLIGATIONS UNDER SAID CONTRACT.

4. IT CAUSES A MISREPRESENTATION TO THE BUYING PUBLIC IN THE SALE OF A PRODUCT UNDER THE CARVEL NAME AND TRADE-MARK WHICH IS NOT, IN FACT, A CARVEL PRODUCT IN ACCORDANCE WITH CARVEL STANDARDS AND INGREDIENTS.

5. IT CAUSES, AIDS AND ABETS IN THE INFRINGEMENT AND UNAUTHORIZED USE OF VALUABLE TRADE MARKS.

EACH AND EVERY OF THE ABOVE ACTS WOULD CAUSE SUBSTANTIAL DAMAGE TO ALL OF THE CORPORATIONS INVOLVED, TO THE CARVEL FRANCHISED DEALERS, AND TO THE GENERAL PUBLIC. FOR THIS REASON, THIS NOTICE ADVISING YOU OF THE IMPORTANT MATTERS INVOLVED AND FIRMLY REQUESTING YOUR COOPERATION, IS BEING SENT FOR THE RECORD. BECAUSE OF THE SUBSTANTIAL RIGHTS INVOLVED, OUR CLIENTS WOULD FEEL OBLIGED TO TAKE ALL STEPS TO PROTECT THEIR INTERESTS AND THE INTERESTS OF THE FRANCHISED DEALERS AND THE GENERAL PUBLIC, AND WILL NOT HESITATE TO ENFORCE ALL OF THEIR RIGHTS BY ALL LEGAL AND EQUITABLE RELIEF AVAILABLE, AS WELL AS ASSERTING IN FULL ANY AND ALL CLAIMS FOR DAMAGES.

ALTHOUGH THIS LETTER IS WRITTEN IN FIRM AND CLEAR TERMS, IT IS NONETHELESS WRITTEN IN A SPIRIT OF COOPERATION AND THE DESIRE TO PREVENT MISUNDERSTANDINGS AND POSSIBLE UNPLEASANTNESS. WE MUST EARNESTLY REQUEST YOUR COOPERATION AND WOULD ALSO APPRECIATE AN ACKNOWLEDGMENT OF THE RECEIPT OF THIS LETTER, AND SOME WORD OR ASSURANCE OF YOUR COOPERATION AND UNDERSTANDING IN THIS MATTER.

VERY TRULY YOURS,

AGREE & MARCIANTE

PAISDD

PHILIP AGREE

PLAINTIFFS' EXHIBIT 20

CARVEL SUPPLY DIVISION
Woodworth Avenue & Babcock Place
Yonkers, New York
YO. 9-6161-2

MEMO TO STORE # 77 DATE FEB. 16TH, 1954.

SUPPLIER # 5

RE: DISCOUNTS FOR ADVERTISING - EFFECTIVE 1/1/54 - 12/31/54

We are proud to report that we have contracted for over 1,500,000 gallons of Carvel Special Formula Mix (made of "all fresh products"), as prime purchaser for 1954 - thus the low price for a high quality product.

We extend to you the following discounts for cash payments or payment of all bills within ten (10) days from date of billing, so that we may always be in a "cash position" to purchase our products.

We purchase a given volume by contract for the year, so that our supplier may anticipate his purchase of fresh products far in advance, for which we receive an advertising and volume purchase allowance.

We develop all mix formulas and make available certain products in its manufacture, inspect and train manufacturing plant personnel where necessary.

All development work done on our formula is entirely our own and we reserve the right to change its manufacture, supplier, or any ingredients without notice, as only our own products may be sold under the CARVEL name.

The following discounts become available to your store ONLY IF ALL BILLINGS FOR MIX, COMMISSARY, SUPPLIES, AND ROYALTIES ARE PAID, DIRECTLY TO SUPPLIER OR US, EITHER IMMEDIATELY UPON DELIVERY OR WITHIN 10 DAYS FROM DATE OF BILLING. This is the only basis on which these discounts are available to your store.

Purchases of mix within ten (10) days from date of Billing from 1/1/54 to 12/31/54 inclusive

up to 500 cans	- 20¢ per can
501 to 1000 cans	- 30¢ per can
1001 to 1500 cans	- 50¢ per can
1501 to 2000 cans	- 65¢ per can
2001 and over	- 75¢ per can

Based on the above mentioned terms, your account will be credited monthly for any discounts earned by your store.

Sincerely,

CARVEL SUPPLY DIVISION

Fred Vettel Jr

Fred Vettel, Jr.

FVJ:cs
2/16/54

CARVEL DARI-FREEZE STORES, INC.
80 WOODWORTH AVENUE
YONKERS, NEW YORK

AUGUST 18, 1954

BULLETIN TO ALL STORES

SUBJECT-----WEEKLY BULLETIN #23

TRUCK STRIKE----------There is a possibility that there will be a general truckers strike called about September 1st. While negotiations are still in progress, we warn the stores at this time to anticipate their needs on paper goods, and commissary to insure their operation, should the negotiations fail. We have ample supplies in our commissary and paper goods warehouses at this time, but should the strike be called, we would not be able to replenish them and it is questionable how long after a called general strike we would be able to continue deliveries to the stores. Anticipate your needs so that should this strike be called, you will still be able to service your customers and maintain your business. Mix deliveries would also be affected, and we would recommend that you continually watch your local newspapers for indications of the progress of negotiations, and should they deteriorate, we recommend that stores maintain at least a weeks supply of mix in their walk-in-box at all times.

LOCAL PUBLICITY----------Store #169, Gottlieb Brothers, Elizabeth, New Jersey reports that they invited the members of a class in their local school to visit their store to have demonstrated to them how CARVEL ICE CREAM is made. They also sampled the ice cream. They have received many letters from the children thanking them and indicating that they have developed many new customers.

SPECIAL SALES----------As you know, under our Franchise Agreement, the stores are not permitted to conduct special sales without first having received permission from the parent organization. However, there are a number of special sales which have been approved for general use throughout the chain and for the benefit of any store which may not be aware of these special sales, we again list them:

1-----3 PTS. ICE CREAM WITH 15 OZ. FRUIT TOPPING	REGULAR VALUE--2.10	SPECIAL VALUE--1.25
2-----4 GIANT SUNDAES	REGULAR VALUE--1.80	SPECIAL VALUE--1.20
3-----8 TAKE-HOME SUNDAES	REGULAR VALUE--2.40	SPECIAL VALUE--1.20
4-----3 STRAWBERRY SHORTCAKES	REGULAR VALUE--1.35	SPECIAL VALUE--1.00
5-----8 TAKE-HOME TARTS	REGULAR VALUE--1.60	SPECIAL VALUE--1.00
6-----1 ICE CREAM PIE AND 1 PINT OF ICE CREAM	REGULAR VALUE--1.45	SPECIAL VALUE--1.00
7-----1 ICE CREAM PIE AND 2 PINTS OF ICE CREAM	REGULAR VALUE--1.90	SPECIAL VALUE--1.00

PLAINTIFFS' EXHIBIT 26

Your Carvel BULLETIN

CARVEL MERCHANDISING DIVISION 80 WOODWORTH AVE., YONKERS NEW YORK

IMPORTANT

BULLETIN CORRECTION

PLEASE MAKE NOTE OF THE FOLLOWING CHANGE IN BULLETIN #6; SHOULD READ AS FOLLOWS:

Page 18, Section J Change the recommended selling price for Chocolate NUT Sundae to 35 cents.

The price of Chocolate Sundae remains the same - 30 cents.

FVJ:jg
5/8/52

IS AN IMPORTANT ADDITION TO YOUR S.O.P.

PLAINTIFFS' EXHIBIT 28

Your Carvel BULLETIN

CARVEL MERCHANDISING DIVISION 80 WOODWORTH AVE., YONKERS NEW YORK

VOL. IV NO. 11

PEACH FESTIVAL - JULY 8TH TO JULY 14TH

REDUCED PRICES. . . . . EFFECTIVE JULY 2ND, THE PRICE ON #204 CARVEL STRAWBERRY PUREE IS REDUCED TO $13.65 PER CASE, AND THE PRICE OF #401 CARVEL WALNUT SUNDAE TOPPING IS REDUCED TO $27.25 PER CASE.

PEACH FESTIVAL - JULY 8TH TO JULY 14TH

THICK SHAKE FESTIVAL . . . PLANS SHOULD NOW BE MADE FOR A STRONG PROMOTION OF THE "THICK SHAKE FESTIVAL" FOR THE PERIOD JULY 22ND THROUGH JULY 28TH. FEATURE ALL FLAVORS OF THICK SHAKES. THICK SHAKE FLOATS SHOULD ALSO BE FEATURED DURING THIS FESTIVAL. MAKE CERTAIN THAT YOUR THICK SHAKE BASE CONTAINS ICE CRYSTALS AT ALL TIMES. SEND IN YOUR REPORTS FOR THE BENEFIT OF ALL THE STORES.

PEACH FESTIVAL - JULY 8TH TO JULY 14TH

NEW FROST BARRIERS. . . . . IF THE NEW FROST BARRIER IS OUT OF SHAPE WHEN DELIVERED TO YOUR STORE, PLACE IT IN WARM WATER FOR A SHORT TIME, AND IT WILL READILY RE-SHAPE ITSELF. CAUTION - FROST BARRIERS SHOULD BE PLACED ON THE MACHINE AFTER YOU HAVE STARTED THE MACHINE, DRAWN ICE CREAM, AND DEVELOPED A FROST SEAL. FROST BARRIERS SHOULD BE REMOVED FROM THE FREEZER BEFORE RUNNING THE RINSE WATER THROUGH THE MACHINES AT NIGHT. THE REASON FOR THESE TWO PRECAUTIONS IS TO INSURE THAT NO RINSE WATER, CONTAINING EITHER BACTERIACIDE OR CLEANSER, WILL COME IN CONTACT WITH THE FROST BARRIER WHILE IT IS ON THE MACHINE, SINCE IF IT DOES, IT MAY GIVE A FOREIGN TASTE TO YOUR ICE CREAM.

PEACH FESTIVAL - JULY 8TH - JULY 14TH

COOPERATIVE ADVERTISING. . . . REMEMBER -- IF YOU ARE TO RECEIVE ANY CREDIT FOR COOPERATIVE ADVERTISING, YOUR ADS OR ADVERTISING PROGRAM MUST BE APPROVED BY OUR ADVERTISING DEPARTMENT PRIOR TO THE PLACING OR CONTRACTING FOR ANY ADVERTISING.

FVJ:JG
7/2/57

PLAINTIFFS' EXHIBIT 29

Your Carvel BULLETIN

CARVEL MERCHANDISING DIVISION 80 WOODWORTH AVE., YONKERS NEW YORK

VOLUME III NO. 6

AS A RESULT OF A RECENT RECOMMENDATION BY THE BOARD OF GOVERNORS, THE FOLLOWING CHANGES IN YOUR S.O.P. HAVE BEEN MADE:

PAGE 14, SECTION J — CHANGE THE RECOMMENDED SELLING PRICE OF THE CARVEL BANANA BARGE TO 50 CENTS.

PAGE 15, SECTION J — CHANGE THE PRESCRIBED QUANTITY OF CARVEL ICE CREAM FOR A 10 CENT CONE TO 3 OUNCES; CHANGE THE PRESCRIBED QUANTITY FOR A 20 CENT CUP TO 6½ OUNCES; CHANGE THE PRESCRIBED QUANTITY FOR A 20 CENT CARVEL WIDE-TOP CONE TO 6 OUNCES.

PAGE 18, SECTION J — CHANGE THE RECOMMENDED SELLING PRICE FOR CHOCOLATE SUNDAE TO _ CENTS.

PAGE 23, SECTION J — CHANGE THE RECOMMENDED SELLING PRICE FOR CARVEL PECAN TREE TO 45 CENTS.

PAGE 29, SECTION J — CHANGE THE RECOMMENDED SELLING PRICE FOR CARVEL CMP SUNDAE TO 35 CENTS.

PAGE 31, SECTION J — YOUR RECIPE FOR FRUIT PACK PINTS. INSERT RECOMMENDED SELLING PRICE, FRUIT PACK PINT, 50 CENTS. RECOMMENDED SELLING PRICE FRUIT PACK QUART, 95 CENTS.

PAGE 33, SECTION J — CHANGE RECOMMENDED SELLING PRICE, CHOCOLATE COCONUT SUNDAE TO 35 CENTS.

PLEASE MAKE THE ABOVE NOTED CHANGES IN YOUR S.O.P. IN INK CROSSING OUT THE OLD FIGURES AND INSERTING THE NEW. NEW PAGES FOR YOUR S.O.P. WITH THE NECESSARY CORRECTIONS WILL FOLLOW AS SOON AS POSSIBLE.

WE ARE ENCLOSING NEW SIGNS TO COVER EACH OF THE ABOVE NOTED CHANGES WHICH ARE FORWARDED AT NO EXTRA COST TO YOU.

FVJ:LS
5/2/56

THIS IS AN IMPORTANT ADDITION TO YOUR S.O.P.

PLAINTIFFS' EXHIBIT 31

Your Carvel BULLETIN

CARVEL MERCHANDISING DIVISION 80 WOODWORTH AVE. YONKERS NEW YORK

VOLUME III NO. 10

TALK ABOUT THE WEATHER??. . . . . WE ALL KNOW THAT THE WEATHER HAS BEEN BAD BUT: : : DID YOU KNOW.

THAT MAY 1956 WAS THE COLDEST MAY IN 32 YEARS . . .

THAT MAY 8TH AND MAY 17TH HAD THE LOWEST TEMPERATURE EVER RECORDED.

THAT THERE WERE 15 DAYS OF RAIN IN MAY 1956 AS COMPARED WITH 3 DAYS IN MAY 1955. . .

THAT THERE WERE ONLY 4 CONSECUTIVE RAINLESS DAYS IN MAY 1956 AS COMPARED TO 24 CONSECUTIVE DAYS OF NO RAIN IN MAY 1955. . .

THAT THERE WERE ONLY 43% OF THE POSSIBLE SUNSHINE HOURS IN MAY 1956 AS COMPARED TO 75% IN MAY 1955. . .

THAT SPRING 1956 (INCLUDING MAY) WAS THE COLDEST IN 16 YEARS. . .

THAT THE AVERAGE TEMPERATURE FOR MAY 1956 WAS 57.2° OR 6.1° BELOW 1955. . .

THE ABOVE FIGURES CONCERN NEW YORK AND ARE BASED ON THE U. S. DEPARTMENT OF COMMERCE WEATHER BUREAU DATA; HOWEVER, THERE IS VERY LITTLE VARIATION IN ANY OF THE STATES IN WHICH WE OPERATE WITH THE EXCEPTION OF FLORIDA.

PRICE STICKERS. . . . . WE ARE ENCLOSING TWO (2) PRICE CHANGE STICKERS FOR YOUR CHOCOLATE NUT SUNDAE LARGE DIE CUT AND CMP SUNDAE LARGE DIE CUT. WILL YOU PLEASE CAREFULLY PASTE THESE OVER THE OLD PRICE. DO A NEAT JOB AND PRESERVE YOUR SIGNS.

PLAINTIFFS' EXHIBIT 33.

GENERAL OFFICES YONKERS 9-7200

CARVEL DARI-FREEZE STORES, INC.
80 WOODWORTH AVENUE
YONKERS, NEW YORK

BULLETIN TO ALL CARVEL STORES

Re: General Organization Meeting of June 6th

A much delayed Meeting (due to the Spring rush) was held on Saturday, June 6th. We list herein items which we think should be brought to your attention.

1. Highest-Volume Areas - It was brought out that the Rochester area is running a close second to Long Island for highest-volume area. This proves another contributing factor to our theory that the areas that have the greatest concentration of stores produces more customers for our stores and thus results in an increased volume in business. Long Island has shown an increase of 34% over last year to date.

2. Weekend Special Advertising - Upon check with the owner of Store #40 it was disclosed that his business increased 200% over last year (comparing exact period of time) as a result of his weekend special advertising program. Upon checking the sales of Store #8 (which is in close proximity to Store #40) it was found that this store had a $1,000 increase the first four months of this season, which indicated that Store #40's tremendous increase did not hurt the sales of Store #8, but merely proved that there was a certain amount of business in the area that had not been reached prior to the weekend special program.

3. Local Suppliers - Several stores have written in to the Supply Division requesting that local houses be approved as supplier to their store for certain items. We are glad to see the interest shown by the various stores. In each event, we have had meetings with these manufacturers and have tested our products against theirs. Please be assured that we are more than happy to entertain any suggestions made by the stores with regard to suppliers. However, please bear in mind that it is impossible for us to have a separate supplier for each small group of stores in our chain, as it would definitely hinder one of the most important assets of our chain - - - uniformity. You can readily understand that where our items are proven superior, and our overall prices lower (which must be uniform throughout the chain), it would not be feasible for us to change a supplier.

4. Sun Rays Hitting Display Counter - A general bulletin has been mailed to all the stores regarding this. We want to make mention of it again, as we cannot stress its importance enough. Be sure to follow the instructions given in bulletin #1359, dated June 5th, as this was a result of tests made in our pilot units and it is of extreme importance that your display items are not subjected to the rays of the sun. We are certain that you are not interested in losing customers, and your selling a product having a foreign taste would definitely result in the loss of business.

5. Storing foreign foods in refrigerated storage cabinets - This is another item of equal importance, which has already been covered by bulletin #1361 dated June 8th. You must remember that the capacity of your store is that of an ice cream manufacturing establishment, and the violation of any of the health codes will jeopardize your manufacturing license. Secondly, items used to manufacture your product, or the finished product itself, will definitely pick up the taste or odor of any foreign food stuff which is stored in conjunction with it. Here again, if your finished product is not of the highest quality you have no other means of keeping your "satisfied customers."

6. Campaign is on! - A few stores in our chain are letting the general appearance of their building and premises fall below par. You would not be interested in stopping at a restaurant that did not look extremely clean and well operated, and by the same token, the public (which includes your present customers) is not interested in buying ice cream at a store which is not in A-1 condition. You will be hearing a lot on this from various members of this organization, in an attempt to get all our stores on the same high level. Please cooperate, as it is for your benefit as well as ours, to have a chain of stores of the highest standard.

7. Bottled Vending Machine ruled out - You will receive formal notice within the next few days regarding the bottled drink vending machine. Based on the vote received, it was decided that we stay with the policy presently established. Those stores presently using a bottled vending machine will be considered in violation of their Franchise Contract.

8. Awnings and Blinds - Aluminum roll-down type awnings were approved for the stores, to be used on the outside to protect them from the sun. This does not include the stationary type, or the canvas awnings. White blinds are also approved for the inside of the stores. They must however, be white or aluminum in color. Your Supply Division will give you whatever information you require.

9. Rental of additional Sign equipment - An additional road side crown, or a Carvel neon sign may be leased on the following basis: $300.00 for the first three (3) years, $1.00 per year thereafter, F. O. B. Yonkers. No installation or sign permits included. If you desire additional sign equipment contact your Supply Division.

10. No SPECIALS during July and August - The weekend special advertising program will be suspended during the months of July and August. We will contact you regarding the continuation of this program the early part of September.

11. News on Convention - Our convention plans are getting under way! We have made temporary hotel reservations for December 3, 4 and 5th. These are just temporary dates, they may be changed. You will be hearing more definite plans in the very near future. Now is the time for you to send in any suggestions (if you haven't already) you may have in conjunction with the convention. We would be very glad to hear from you, and if you feel you would like to be active in planning this year's convention, you can be assigned to a committee. Just let us know, and we'll put you to work!*

12. Stores in Wisconsin - Mr. Leon Schneider President of the Wisconsin organization has really gotten the midwestern stores well on their way. Their 4th unit is scheduled to open this weekend. We all join in wishing Mr. Schneider continued success, and welcome the new stores into our chain.

13. Two More Added - Carvel stores have also opened in two more states -- Connecticut and Massachusetts. Welcome into our chain!

14. Face Lifting Job - Our new sales division building is now roof high. Our new building, which is being erected on the site of the old sales division behind Store #8, will house New York, New Jersey and Pennsylvania sales divisions.

15. Rain didn't hurt sales - Our reports show that in spite of the heavy rains on recent weekends, our stores have held their own, and in some cases an increase was shown.

16. Selection of New Owners - The Sales Division wishes to express its thanks for your efforts and good judgement in the selection of new store owners, which have been referred to us. The bonus is still yours for this service.

Don't let the length of this report frighten you. We're always glad to hear from you, and look forward to your comments regarding the items covered herein.

Sincerely,

CARVEL DARI-FREEZE STORES, INC.

Thomas Carvel

AM:HC

THOMAS CARVEL

#1369

* The following Committees require Store Owners' assistance:

1. Entertainment Committee
2. "Whoopee Room" attendants
3. Bar Keepers (Who are light drinkers).
4. Photographers (We have the camera--4" x 5" Graflex--but you can use yours if you like).
5. Seating Committee
6. Ticket Committee
7. Door Committee
8. Room Reservations
9. Reception Committee
10. Gift Committee
11. Ladies Auxiliary

PLAINTIFFS' EXHIBIT 35

Your Carvel BULLETIN

CARVEL MERCHANDISING DIVISION • 80 WOODWORTH AVENUE • YONKERS, N. Y.

CARVEL BULLETIN

On Wednesday and Thursday, February 5th and 6th, the Sixth Annual Convention of Carvel Store Owners was held in the Park Sheraton Hotel in New York City.

On Wednesday registration of all store owners was conducted in the Chinese Room from 9 A.M. until 12 Noon. At the same time, Clinics were held in the Tropical Room by members of the Board of Governors assisted by the Supervisors. At the Demonstration Clinics a new item, a Pecan Roll, was demonstrated as were Carvel Cakes, Carvel Pies, Papapaloozas, Lollapaloozas and Flying Saucers. Questions with regard to the operation of the freezers were answered. New equipment was also demonstrated and special attention was given to the Carvel Thick Shake Machine. At the same time that the Demonstration Clinics were conducted, personnel from Accounting, Financing, Merchandising, Service and many other Carvel Departments were answering questions of the store owners with regard to the particular Department concerned.

The Clinics were closed at Noon and a delicious Buffet Luncheon was attended by so many of the store owners and their guests that it was necessary to use the adjoining facilities in order that the overflow crowd might be accommodated.

Immediately following the Luncheon, the first Business Meeting was opened by Mr. Frank Roberts, the head of the Carvel Public Relations Department, who welcomed the store owners and introduced Fred Vettel. Mr. Vettel outlined the program for the afternoon of February 5th and the morning and afternoon of February 6th and then introduced Mr. Thomas Carvel.

Mr. Carvel reviewed the accomplishments of the past year and announced that by comparison with others in our industry, we had enjoyed another excellent year. He cited the business recession which had taken place during 1957 and reviewed the minimum effect it had had on many other major industries. He predicted that the business down-trend had now reversed itself and would reflect in a slight up-trend during this New Year of 1958. He stated that Carvel still maintained its standing of the top dollar volume chain in the industry.

Mr. Carvel outlined his beginning in the soft ice cream business and the fact that he and the Carvel organization originally had been in the soft ice cream vending vehicle business both in the manufacture of equipment and the operation of vehicles. He followed the history of the Carvel organization and how it had gotten out of the vehicle business in preference to the store business. He indicated that some three years ago he had observed the return of the soft ice cream vehicles to the vending field and had hoped that they might not be successful or might be legislated out of business, since he was fearful that they might take the soft ice cream business down the same precarious trail that the custard business had followed some twenty-five years ago.

of the history of the new soft ice cream trucks and the inroads they had made into our industry. He also reviewed the influx of hard ice cream vending vehicles into the ice cream business and the inroads that the sale of ice cream in the supermarkets was now making into the ice cream industry. Mr. Carvel continued that, in view of these various new branches of our industry, the Carvel organization had investigated the possibility of entering some of these new fields. In view of the tremendous dollar interest shown in the use of the Carvel name in conjunction with these new branches of the industry, the Carvel organization had decided to investigate to their fullest extent these new divisions. He reported that several stores had been selected and vehicles operated selling Carvelproducts in the area of those stores. One store had been selected in the South, two in New York and one in Wisconsin. In each area, a Carvel vehicle had sold Carvel products in the area of the operation of the Carvel store. Canvassers had also been used in conjunction with the vehicles to develop a customer trade for the vehicle. He reported that the canvassers had received a 90 per cent or better customer acceptance, and of these, on some days as high as 70 per cent result in sales. He reported that the average sale was $1.39. The total over all average for the entire survey was in the neighborhood of 40 per cent sales. Mr. Carvel reported that the results from all of the tested areas were far beyond any expectations of the organization. To give a complete report of the actual results obtained and the operation, Mr. Carvel then introduced Mr. John Leo, who had conducted the survey and truck operation in conjunction with Store #113 in Poughkeepsie, New York.

Mr. Leo stated that the vehicle had been in operation in his area by him for about five weeks. That the vehicle was operated six days a week from 10:30 in the morning until 4:30 in the afternoon. He stated that the first week the vehicle was in operation it produced a gross volume of $96.00. The first week the truck was operated on a canvassing basis and as a result of the experience of the first week, they decided to operate on a route basis. The second week on a route basis, the sales from the vehicle jumped to $218. For the month of January the truck had produced a volume of a little over $1,000.00. Those sales were obtained strictly from take home items, Mr. Leo reported. He alsoreported that while this volume was being obtained from the truck, the store volume had increased. In 1957 they did not consider there was sufficient business in the store to make it worth their while to remain open. While in 1958, at the same time that the truck was operating in the area of their store, they had produced a volume of 45 cans for the month of January. Mr. Leo reported that after five weeks of operation, they now had over 400 steady customers. Mr. Leo also reported that in home after home that he visited he found their freezers stocked with ice cream purchased from the local supermarket or a source other than Carvel. That the customer welcomed the Carvel Home Delivery Service and, as a result of it, the freezers were gradually being transformed to Carvel stocked freezers.

Mr. Carvel then reviewed the operation of the other vehicles in the other test areas and noted that they had all shown similar results. He announced that as a result of these surveys, the Carvel organization had decided to go into the vehicle business and had assigned the responsibility for the Vehicle Division to the American Hostess Council Corporation. Mr. Carvel contined that the protection of the product sold from the vehicle was of prime importance, and to that end, at least 1½ times the refrigeration in the freezers would be required for the storage and hardening of the ice cream products to be sold from the vehicle. Mr. Carvel also anticipated that it would be necessary that a commercial manufacturer be developed for the manufacture of certain of the items to be sold from the Carvel vehicles.

Mr. Carvel stated that he knew that this new venture had excited much interest on the part of the store owners and that we had endeavored to answer all of the questions through the Convention. However, should any store

owner have any question after the Convention, he announced that all would be answered if they were presented in writing to any member of the Carvel Hostess organizations or addressed to 80 Woodworth Avenue, Yonkers, New York. Mr. Carvel then introduced Mr. Fred Suthergreen, President of American Hostess Council, that organization having been designated as the distributor and sales organization for the Carvel vehicles.

Mr. Suthergreen stated that he felt this was a tremendous opportunity for the store owners to enter this new venture and augment their incomes. Mr. Suthergreen continued that it was certainly not the intention of the organization to in any way hurt any store operator, but rather that it was their avowed intention to help every store operator in every way they possibly could. Mr. Suthergreen reiterated Mr. Carvel's remarks that the American Hostess Council would be happy to answer any questions which might be submitted in writing.

Mr. Carvel then turned the microphone over to Mr. Vettel, who introduced the store owners present from the Wisconsin organization and the Chairman of that group, Mr. Leon Schneider; Mr. Arthur Hobart, who represented the Carvel Stores of Indiana; the Board of Governors and those store owners wearing the "Old-Timer's" ribbons. Mr. Vettel announced that this was the largest attendance that had ever been present at a Carvel Business Meeting in the history of the Carvel Conventions. He then discussed the recommendation of some store owners that the selling prices of items be increased and the remarks of many store owners, that "Everything Had Gone Up in Price." In conjunction with his remarks regarding price increases and increased prices, Mr. Vettel introduced Mr. Joseph Lawrence of Store #263, Rome, New York, who spoke on "Prices and Customer Relationship." Mr. Lawrence stated that "business is not an automaton but that it is run by people and that its success or failure is on a high personal level." He continued, "we are all in business for the same reason - profit - but we cannot sacrifice volume for the sake of false profit. You can't make a profit without a sale. Customers go where they find what they want. Live close to your customers and learn more about what they want and need. The customer is more than a source of volume or profit. He is the business itself. He pays our rent, clothes and feeds our family. Do our social friends mean so much to us as this? Do we treat our customers so that we are aware of what they mean to us? Unfortunately, I'm afraid we do not. If more customer friendship can be obtained this year, this will be a successful year to its fullest extent", concluded Mr. Lawrence.

Mr. Vettel then resumed his remarks with regard to "Everything Has Gone Up in Price." He made a comparison of an average store's purchases in 1957 with the purchase of the same quantities of the same item in 1952, 53, 54, 55 and 56. Mr. Vettel determined that on commissary purchases the prices had actually decreased almost 10%. Paper goods were up about 6%. A saving of over $200.00 on commissary and an increase of under $100.00 on paper goods for a total saving on the two items of over $100.00. Cones were up about $40.00 on an average store's purchases for the 5 year period. The average store saved $250.00 on Mix purchases on the basis of the reduced price of Mix in 1957 as compared with 1952. On the over-all picture of all items purchased, including paper goods, commissary Mix and cones, there was a saving in the average store on their purchases for 1957 of over $300.00 under the prices paid for the same merchandise in 1952. Mr. Vettel continued that at the same time that these prices had been going down the return from a can of Mix, as a result of the improvements in the Mix and the reduction in the portion of some items, had gone up. Whereas, the average store in 1952 was getting a return of $40.00 a can, today they are getting a return of $50.00 a can, or in a 500 can store, an increase in Net Profits of over $5,000.00.

... Vettel announced that during 1958 we hope to have a plastic dish to replace the present 727-305 and 731-350 paper dishes. It is anticipated that the price of these new plastic dishes will be at, or slightly below, the price of paper dishes. The anticipated new plastic dishes will be made from a clear plastic material and he predicted that Carvel will be the first in the industry to offer a clear plastic dish in the service of ice cream at no anticipated increase in cost to either the customer or the store owner.

Mr. Vettel then outlined the serious situation which had arisen in the area of some of the stores with regard to sanitation and cleanliness. He introduced Dr. Robert Beardsley, Head of the Supervisory Department, who addressed those present with regard to Sanitation and Cleanliness in the stores. Dr. Beardsley, in conjunction with his talk, conducted a most impressive demonstration of the serious consequences which could befall the customers of any store not operated to the required standards of the S.O.P. and Health Departments. For his experiment, Dr. Beardsley had the assistance of a group of white rats one of which he injected with the same contamination as might be found in ice cream served from a store not operating under the required conditions of sanitation and cleanliness. The impressiveness and acuteness of Dr. Beardsley's demonstration was best attested to by the large group of store owners which visited the Sanitation Clinic and expressed their interest through questions and requests for demonstrations. (Many of those present expressed concern for Gwendolyn (the rat). For your information, Gwendolyn expired shortly after the meeting concluded.

Mr. Vettel then reviewed the history of the question of the soda machines in Carvel stores, outlining the tests conducted some two years ago and the results from those tests, which indicated that sodas might represent from 1 to 3% of the total business of the average store.

On the basis of those original tests it was decided at that time by the Board of Governors that this was not a profitable item for the stores to carry nor was it an item worthy of the investment necessary to make it possible for the stores to serve sodas. As a result of the question of sodas again being suggested at a Board of Governors Meeting during 1957, it had been decided that in an effort to resolve this question and eliminate some of the confused thinking in regard to it, that for the 1958 Convention, there be displayed various types of equipment which might be suitable for use in Carvel stores to give the store owners an opportunity to view this equipment and express their opinions and recommendations with regard to it. Mr. Vettel emphasized that the product produced by any machine which might be approved would have to be one of excellent quality to maintain the reputation of the Carvel name for quality. That no brand name other than Carvel would be used in conjunction with any drink and that any drink served would have to be served in conjunction with ice in order to produce a quality drink. He also stated that, in the event enough interest was shown by the store owners to warrant consideration being given by the parent organization for this change, a single machine would be approved and that it could probably be discounted to the stores at about 25% off the list price and, should the volume go high enough, that possibly as much as 30% might be discounted. Mr. Vettel concluded that the consideration of this item would be based upon the amount of interest shown by the store owners and that it would be necessary for any store owner interested to write to the parent organization or to his local member of the Board of Governors signifying his interest in a particular machine and indicating his desire to purchase that machine.

The Meeting was adjourned at 4:30. With the conclusion of the Meeting, the opinions and demonstrations were reopened and received the attention of most of the store owners present. Early in the evening the bar was opened and from then on hilarity took over from the serious business of the meeting.

On Thursday, February 6th, the activities of the second day began in the morning at 9 A.M. with a Board of Governors Breakfast held in the Sheraton Park Room of the Hotel. Immediately after the Board of Governors Breakfast, the Clinics were again reopened and conducted demonstrations and answered questions from 10 A.M. until 1:30 P.M.

At 1:30 P.M. the meeting was called to order by Mr. Vettel. Mr. Vettel showed samples of the new plastic dishes to those present and also introduced the new Carvel Pecan Roll. This item was demonstrated throughout the Convention and samples were shown to the entire gathering at the meeting.

Mr. Dietze was then introduced to the assembly and, preliminary to his talk, in his own inimitable fashion, Mr. Dietze injected a note of levity into the proceedings with a discourse on his problem with his house, his doctor and the prescriptions with which he is provided. Mr. Dietze reviewed the advantages of advertising in every store and cited as examples the results that certain particular stores have been able to achieve through the promotion of their store by means of a local advertising campaign for the particular store. Mr. Dietze also cited the advantages to the stores in grouping their advertising and gave, as an outstanding example of the accomplishments that a group might achieve, the results that had been obtained in the Rochester area. The entire group of stores entered into a combined advertising campaign to promote their stores and Carvel products, which had resulted in the Rochester area, once again, being in that select group at the top of the list of volume stores. Mr. Dietze encouraged all present and, in fact, every store to promote their business, develop sales, and increase their profits through individual and collective advertising campaigns in 1958.

Mr. Dietze then introduced Mr. Harold Matthews of Store #200, who spoke on the new Thick Shake Machine and the experience he has had with it in his store during the past four months. Mr. Matthews cited the convenience of operation in that the machine has a self-contained storage cabinet which makes it possible to store the Shake Mix in the original container and pump it from the container directly into the freezer. He indicated that with the Thick Shake Machine any store could facilitate the service of Shakes since it was possible to serve Shakes almost as fast as the customers approached the window with the machine, as compared to the delay of three or four minutes per shake when made by hand. Mr. Matthews also pointed out the considerable saving in cost of ingredients in a Shake made by the machine as compared with a handmade Shake. Mr. Matthews stated that the Carvel Thick Shake machine will produce a better Shake than 80% of the stores are now producing. Mr. Matthews concluded by stating that he believed that this machine would be an asset in every store and that, if he were to open a new store tomorrow, he would not consider opening the store without one of the Carvel Thick Shake machines as part of the equipment.

Mr. Vettel then asked the Board of Governors to stand in a group, so that they might be publicly thanked for the efforts they had put forth to make this the best attended and greatest Carvel Convention ever held. Mr. Vettel then read from the By-Laws of the Board of Governors the purpose of that organization.

"The purpose of the Governors shall be:
(A) To assist and to recommend policies of improvement of Carvel Stores.
(B) To assist in the promotion of store sales of Carvel products, at store level.
(C) To assist in fostering, advancing and encouraging a more enlarged, closer and friendlier association and business relationship within the Carvel Family of Stores."

Mr. Vettel reviewed the accomplishments of the Board of Governors and noted the remarkable achievements that have been obtained as a result of the Board of Governors in the short period of the existence of that organization. Mr. Vettel requested the assistance of every store owner in improving the functions of the Board of Governors in 1958, by the store owner contacting the local member of the Board of Governors to give his representative the benefit of his ideas and thoughts and recommendations with regard to improved store operation. Mr. Leon Schneider, head of the Carvel organization in Wisconsin, was then introduced. Mr. Schneider reported on the results which had been obtained in Wisconsin from the test of bicycle vending vehicles. Two bicyles were supplied by a single store and used from Memorial Day until Labor Day. Although other items were carried from time to time, the basic items were Lollapaloozas and Flying Saucers. Mr. Schneider reported that each bicycle averaged about $42.00 for each eight hour period that it operated. He also reported that the same store operatore with the same selling prices as in 1956, had increased the store net almost 1%, as a result of the bicycles. Mr. Schneider stated that the store owner had indicated that also as a result of the bicycles, additional business had been brought into the store.

Mr. George Clark was then introduced to the Meeting. Mr. Clark further discussed the Carvel vending vehicles. Mr. Clark reported that the vehicle idea was not a new one. That it had been discussed as long as four or five years ago. Mr. Clark stated that when the vehicles were first discussed he was definitely against it, but that after he had done some research into the possibilities and actual results of the vehicle, he had changed his opinion and now felt that any Carvel vehicle could only improve the business of the store, and add to the business by the sales and profits made from the vehicle. He also felt the Carvel vehicles would do as much or more volume than the best known and operated vehicles in the business today. He announced that there was now available a Carvel soft-serv vehicle, which would sell for approximately $15,000.00, a hard vehicle, which would sell for approximately $4200.00, two types of scooter vehicles, one to sell for approximately $1400. and the other for approximately $1250.00, a Carvel bicycle, at an approximate cost of $230.00 and a Carvel Pushmobile, the price of which had not been determined as yet. All vehicles will be operated as Carvel vehicles with Carvel sign equipment installed thereon. Mr. Clark continued that actual experience indicated that any Carvel vehicle operating in the area of any store will increase the volume of the Carvel store. He cited, as an example, one store which normally closed during the winter months due to a lack of business which had been forced to remain open, due to the tremendous influx of business as a result of the operation of a Carvel vehicle in the general area of the store. Mr. Clark announced that the supervision of the operation of Carvel vehicles will be extremely stringent and equally as tight, if not tighter, than the supervision of the sale of merchandise from Carvel stores. He continued that any route that was sold for any vehicle would carry a franchise with it and that the franchise for the vehicle area and operation will be more stringent than the present store franchise. He also announced that each vehicle franchise holder would be required to post a $2500.00 Cash Security Deposit, guaranteeing non-violation of the franchise area in which

the particular vehicle operates. Mr. Clark continued that the organization would far rather sell a Carvel vehicle to each and every store owner, than to any other person. However, this can only be done if the store owner wishes to purchase the vehicle. He continued that it is the firm purpose and intent of the organization to give every store owner the first opportunity to own a Carvel vending vehicle in and around the area of his store. Mr. Clark concluded his remarks by again requesting that any store owner that had any question with regard to the vehicle put it in writing and address the letter to the American Hostess Council in Yonkers, New York and stated they would be more than happy to answer any question with regard to the vehicles.

Mr. Carvel brought the meeting to a close with a few well-chosen stories such as only he can tell.

After the meeting the Clinics were again opened for the benefit of instructions and questions from any store owner.

At 7:30 in the evening there was a Cocktail Party in honor of the Board of Governors held in the Foyer of the Grand Ballroom of the Park Sheraton Hotel. Everyone having partaken of a sufficient amount of liquid refreshments to get them into the frivilous spirit of the occasion, the doors were thrown open and the Grand Ballroom soon filled to capacity. The attendance at the Banquet was so great that it required numerous additional tables to accommodate the overflow crowd. A delicious dinner was enjoyed by all and everyone was surprised to find bottles of "spirits" on each table. After dinner the Officers of the Carvel organization were introduced from the dais and the following awards for outstanding achievements during 1957 were made:

Greatest Per Cent Increase in Sales under Same Ownership - Store #5511, Mr. & Mrs. Robert Kelly, Milwaukee, Wis.

Greatest Per Cent Increase in Sales - Old Store, New Owner - Store #360, Mr. John Minerva, Flushing, N.Y.

Advertising Sparkplug Award: Store #241, Messrs. Sidney Muffs & Denny Mell, West Hartford, Conn.

Greatest Contribution to the Betterment of the Chain - Store #200, Messrs. Dobmeier & Harold Matthews, Roosevelt, L.I., N.Y.

Greatest Papapalooza Sales - Store #48 - Messrs. Lewis & Ludwig Bieringer, E. Meadow, N.Y.

Greatest Lollapalooza Sales - Store #162 - Messrs. Frank Phillips, Benjamin Schatten & William Filipovsky, Teaneck, N.J.

Greatest Flying Saucer Sales - Store #325 - Mr. Thomas Amari, Brooklyn, N.Y.

Greatest Plastic Banana Barge Sales - Store #134 - Mr. & Mrs. Leonard Sandelin, Syracuse, N.Y.

After the presentation of Awards, there was an excellent Show and the entertainment was enjoyed by all. Following the entertainment there was dancing to the music of a wonderful orchestra into the not-so-wee

-o-

[illegible] of the morning. [illegible] and souvenirs were distributed to each of the stores present.

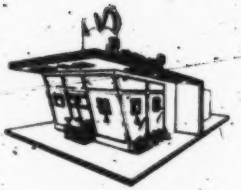
It was the unanimous consensus of opinion of the store owners that this Convention had, once again, surpassed all others. The attendance was the largest we have ever enjoyed. In fact, the attendance was so great that it will be necessary for us to seek other facilities next year in order to have comfortable accommodations for those that wish to attend.

To those who attended the 1958 Convention we express our thanks for your attendance and cooperation during the Convention and feel confident that the information, knowledge and materials which you received during the Convention made more than worthwhile your presence.

To those who were unable to be at the Convention this year, we suggest that you plan now to be with us in 1959. With the help of all store owners, we anticipate an even greater attendance and greater benefit to all in 1959. Set the dates aside now - Wednesday and Thursday, February 4th & 5th, 1959.

PLAINTIFFS' EXHIBIT 36

80 WOODWORTH AVENUE • YONKERS, NEW YORK



REPLY TO March 14, 1960

Dear Store Owner:

On the "C" Day return sheet dated March 8, 1960 which you forwarded to our office, you indicated your intent to advertise the "C" Day promotion.

This is just a little reminder that to receive cooperative credit for this or any other advertising you must submit the following information PRIOR to the placement of the ads.

1. Type of advertising (radio, newspaper, TV, etc.)
2. Size of ad (length of announcements if radio or TV)
3. Number of times ad will be placed (number of announcements if radio or TV)
4. Copy which will be used in ad (script, if radio or TV)
5. Total cost of advertising

Immediately that this information is received, we will forward our approval.

AFTER the ads have been run, forward us a copy of your bill, together with copies of the ad or ads, if newspaper, or a copy of the station verification, if radio or TV, and we will issue the cooperative credit toward the cost.

Don't delay! Forward the above information promptly so that you will be all set to get your season off to a good start.

Sincerely yours,

CARVEL ADVERTISING DEPARTMENT

FVJ:jv

Frank E. Roberts

PLAINTIFFS' EXHIBIT 37

Carnel

C DAY

MAY 7th

VOLUME VII NO. 10

THIS YEAR WE HAVE CHANGED THE FORMAT FOR "C DAY". INSTEAD OF THE USUAL "FREE FLYING SAUCER" WE WILL PROMOTE A "2 FOR 1 SALE" ONLY ON CONES AND ONLY FOR CHILDREN ACCOMPANIED BY AN ADULT.

TO ENCOURAGE THE STORES TO GET THEIR SEASON OFF WITH A BANG AND FOR THIS ONE PROMOTION ONLY, WE WILL CONTRIBUTE 50% TO ANY *APPROVED ADVERTISING DONE BY YOUR STORE.

WE WILL ALSO PROVIDE, AT NO COST TO THE STORE, 2 LARGE COLORFUL WINDOW POSTERS FOR EACH PARTICIPATING STORE.

SO THAT WE MAY KNOW YOUR INTENTIONS AND FINALIZE OUR PLANS, WILL YOU PLEASE SIGNIFY YOUR COOPERATION ON THE RETURN SHEET ENCLOSED AND RETURN IT TO US IN THE SELF ADDRESSED ENVELOPE BEFORE MARCH 15TH.

*REMEMBER, YOUR ADVERTISING MUST BE APPROVED BY THE ADVERTISING DEPARTMENT PRIOR TO THE PLACING OF THE AD.

FVJ:JG
3/8/60

PLAINTIFFS' EXHIBIT 38

Your Carvel BULLETIN

CARVEL MERCHANDISING DIVISION • 80 WOODWORTH AVENUE • YONKERS, N. Y.

U. S. Pat. No. 169055

VOLUME VI NO. 36

BOARD OF GOVERNORS MEETING.....There will be a meeting of the Board of Governors on Wednesday October 21, 1959. Any store owner that has constructive recommendations or suggestions should contact the Governor representing his area.

HALLOWEEN?.....Is your refrigerated front counter set up with a Halloween display? We gave you the signs and ideas....it's up to you to carry the ball!! The .222 Carvel Orange-Pineapple is a perfect Halloween Orange when used with candy corn that can be purchased at your local candy store.

CARVEL FREEZY PAKS.....A Carvel Exclusive Item for use especially in the ice cube section of a home refrigerator. These 606 Carvel Freezy Paks are available from the Supply Division..... 72 for $15.50.....You realize a profit of 50¢ to 60¢ each.....Stores that feature this item sell 5-6 cases per year to repeat customers.....daily feature posters available @.10 each with picture of the item on the sign.

PRICE SIGNS.....Now that the stores are featuring Cakes and Logs, don't forget the price tabs we have available to use in conjunction with the Ice Cream Cake and Ice Cream Log giant cut-outs.....only 10¢ each.

S.M.T/jcs
10/12/59

PLAINTIFFS' EXHIBIT 40

Carvel STORES
OF NEW YORK, INC.

80, WOODWORTH AVENUE, YONKERS, NEW YORK - YOnkers 9-7200
95 SOUTH CENTRAL AVENUE, HARTSDALE, NEW YORK - White Plains 6-8200

REPLY TO 80 WOODWORTH AVE.
YONKERS, N.Y.

MAY 24 1956

MR. & MRS. PAUL GIBERMAN
CARVEL STORE #256
311 SNOWBALL DRIVE
LEVITTOWN, PENNSYLVANIA

DEAR MR. & MRS. GIBERMAN:

THANK YOU FOR YOUR LETTER DATED MAY 19TH. WITH REFERENCE TO THE SHELF IN QUESTION, WE BELIEVE YOU WILL AGREE THAT ONE OF THE APPEALS OF CARVEL STORES TO YOUR CUSTOMERS IS THE UNIFORM APPEARANCE OF THE STORES. THIS UNIFORMITY WE REQUIRE TO BE MAINTAINED IN OUR FRANCHISE AGREEMENT AND WE ALSO EXERT EVERY EFFORT TO ENCOURAGE THE STORE OWNERS TO MAINTAIN THAT SAME UNIFORMITY TO THE MUTUAL BENEFIT OF THEIR PARTICULAR STORE AND THE ENTIRE CARVEL ORGANIZATION. FOR THIS REASON WE HAVE REQUESTED THAT THE SHELF BE REMOVED IMMEDIATELY. IN AN EFFORT TO HELP YOU WITH THE PROBLEM OF DISPLAYING THE TAKE-HOME CARVEL TOPPINGS, WE QUOTE FROM A LETTER RECEIVED FROM ONE OF YOUR FELLOW STORE OWNERS.

> "THESE SUNDAE TOPPINGS ARE A VERY GOOD IDEA -- SOLD OUR AND WE ARE AWAITING A REFILL ORDER. MY CUSTOMERS PURCHASE THEM JUST ON SIGHT - WHICH THEY WOULDN'T DO ONLY FOR THE FACT THAT THEY ARE KEPT IN THE FRONT WINDOW NEAR THE REGISTER WHERE THEY SEE THEM AND FEEL THEY SHOULD TAKE SOME HOME."

PERHAPS THIS WAY OF HANDLING THIS MERCHANDISE, WHICH HAS WORKED SO WELL IN ONE OF OUR VERY BEST STORES, MIGHT ALSO PRODUCE SALES IN YOUR STORE.

IT HAD BEEN REPORTED TO US THAT YOUR STORE WAS SELLING A CONE AT A 15¢ SELLING PRICE. AS YOU KNOW, ONLY 10 AND 20¢ CONES ARE PRESCRIBED IN THE S.O.P., AND FOR THIS REASON WE BROUGHT IT TO YOUR ATTENTION IN OUR LETTER DATED MAY 17TH. WE CERTAINLY AGREE WITH YOU THAT THEIR CAN BE NO CRITICISM OF YOUR OPERATION IF YOU ARE ONLY SELLING 10 AND 20¢ CONES AS PRESCRIBED IN THE S.O.P., AND CERTAINLY NO ONE COULD MAKE ANY CRITICISM OF YOUR OPERATION IF YOU EXCEED THE MINIMUM REQUIREMENTS OF THE RECEIPE. IT WOULD BE FOOLHEARTY FOR ANYONE TO DISCOURAGE YOU IN DISPENSING GENEROUS PORTIONS TO YOUR CUSTOMERS SINCE PAST EXPERIENCE HAS PROVEN THIS TO BE ONE OF THE BEST METHODS OF DEVELOPING A PROFITABLE CARVEL STORE.

You mention in your letter that you are aware of numerous stores in your area which are selling a 15¢ cone. If you will provide us with the location of the stores in question, we will be happy to take whatever steps are necessary to have these stores conform to the operation as prescribed in the S.O.P. We might mention, however, that customers are notable for giving misinformation in an effort to achieve their own personal end, and in numerous cases in the past this has proven to be the case when all of the information involving a complaint such as yours.

Your local member of the Board of Governors was absolutely correct in telling you that you can sell any size cone you deem necessary so long as you maintain the 10 and 20¢ selling prices as recommended in the S.O.P. and that you do not go below the minimum portions prescribed in the S.O.P. For instance, the S.O.P. recipe for a 10¢ cone requires a minimum of 3 oz. Should you increase your portion to 5 oz. and still maintain the same selling price, there could be no objection to this. This same thing could be applied to any product, the recipe for which is contained in the S.O.P., so long as you do not go below the minimum requirement.

We hope that the above answers any question you may have had in mind with reference to our letter of May 17th, and we look forward to receiving the information necessary so that we can properly service your complaint with regard to other stores operation.

Sincerely yours,

Carvel Merchandising Division

Fred Vettel, Jr.

Fred Vettel, Jr.

FVJ:jc

PLAINTIFFS' EXHIBIT 41

Carvel STORES
OF NEW YORK, INC.

80 WOODWORTH AVENUE, YONKERS, NEW YORK · YOnkers 9-7200
98 SOUTH CENTRAL AVENUE, HARTSDALE, NEW YORK · WHite Plains 9-6200

REGISTERED MAIL
RETURN RECEIPT REQUESTED

REPLY TO 80 Woodworth Ave.
Yonkers, N.Y.

#256

July 17, 1958

Mr. & Mrs. Paul Giberman
Rt. #413 nr Plumridge Pass
Bristol Township, Pa.

Dear Mr. & Mrs. Giberman:

Thank you for advising us that you are selling Carvel products manufactured at your store to retail outlets other than a Carvel store at wholesale prices.

For the purposes of the record, this is to advise you that the use of the Carvel name and trademarks has been granted to you, as indicated in your Dealer's Franchise Agreement, #000558, for use in conjunction with sales "of the end product that is offered for consumption to the retail purchaser as scheduled in the Standard Operating Procedure Manual at prices indicated therein." The protection of the Carvel name and trademarks, our and your interests and the public necessitates the definition of the Carvel store as one engaged in the "production, creation, sale and distribution at retail, of Carvel's frozen dairy products."

This is to formally advise you that the practice of wholesaling referred to above and about which you requested information, is a breach of your Dealer's Franchise Agreement, and must be discontinued within forty-eight (48) hours after this notice.

Very truly yours,

CARVEL STORES OF NEW YORK, INC.

Robert E. Beardsley
Chief Supervisor

REB:eb

cc: RR 311 Snowball Dr.
Reg.M- Levittown, Pa.

Reg M. - Rt. #413 nr Plumridge Pass
Bristol Township, Pa.

PLAINTIFFS' EXHIBIT 45

Eagle Cone Corporation

All Prices Subject To Change Without Notice

The quantity ordered for any one shipment determines price bracket. Items may be combined to reach minimum price bracket.

MINIMUM PREPAID SHIPMENT: 10 Cases. A 5% allowance will be made from the 25 case prices on all straight carload shipments.

BRAND	Packing	Unit	PREPAID 25 Cases or More	PREPAID 15 to 24 Cases	PREPAID 10 to 14 Cases	F.O.B. BAKERY 5 to 9 Cases	F.O.B. BAKERY 1 to 4 Cases
Flare-TOP Flavor-ized Dripless Cones (disp. pk.)	10/100	M	$5.75	$5.80	$5.90	$6.10	$6.90
Flare-TOP Flavor-ized Dripless Cones	4/250	M	5.75	5.80	5.90	6.10	6.90
Jr. Torch Cones	4/500	2M	9.70	9.75	9.85	10.05	11.65
Crispo Special Cones (Reinforced Top)	4/250	M	5.55	5.60	5.70	5.90	6.65
My-T-Hi Cones (Reinforced Top)	10/100	M	5.55	5.60	5.70	5.90	6.65
Duble Heder Cake Con	2/300	600	5.40	5.45	5.55	5.75	6.50
Delicia Kreem Kups	4/250	M	6.10	6.15	6.25	6.45	7.30
No. 10 Take-Out Cups (disp. pk.)	10/100	M	6.10	6.15	6.25	6.45	7.30
No. 20 Take-Out Cups (disp. pk.)	10/100	M	6.10	6.15	6.25	6.45	7.30
No. 20 Take-Out Cups	4/250	M	6.10	6.15	6.25	6.45	7.30
No. 25 Take-Out Cups (disp. pk.)	10/100	M	6.10	6.15	6.25	6.45	7.30
No. 25 Take-Out Cups	4/250	M	6.10	6.15	6.25	6.45	7.30
No. 8 Eat-It-All Cake Cups (disp. pk.)	6/100	600	5.20	5.25	5.35	5.55	6.25
No. 8 Eat-It-All Cake Cups	2/300	600	5.20	5.25	5.35	5.55	6.25
No. 35 Eat-It-All Cake Cups (disp. pk.)	6/100	600	5.60	5.65	5.75	5.95	6.70
No. 35 Eat-It-All Cake Cups	2/300	600	5.60	5.65	5.75	5.95	6.70
No. 40 Eat-It-All Cake Cups (disp. pk.)	6/100	600	5.60	5.65	5.75	5.95	6.70
No. 40 Eat-It-All Cake Cups	2/300	600	5.60	5.65	5.75	5.95	6.70
No. 55 Eat-It-All Cake Cups	2/300	600	5.60	5.65	5.75	5.95	6.70
No. 60 Tall Cake Kups (5½ oz.)	2/300	600	7.80	7.65	7.75	7.95	9.10
No. 62 Super Kups (6 oz.)	4/100	400	8.10	8.15	8.25	8.45	9.70
Square Waffles	8/250	2M	8.65	8.70	8.80	9.00	10.40

DISPENSERS		DILUXE		CRISP-A-LITE	
CONE SIZE	No. 1 Flare-TOP, Nos. 2 and 25 Take-Out	Stock No. 102	PRICE	Stock No. 702	PRICE
	No. 8 Eat-It-All, No. 3 Dollies	Stock No. 104	$4.50	Stock No. 704	$4.35
	No. 10 Take-Out	Stock No. 106	F.O.B. Bakery	Stock No. 706	F.O.B. Bakery
	Nos. 35, 40, 45 and 55 Eat-It-All	Stock No. 108		Stock No. 708	

8170-11-58

Flavor-tyed

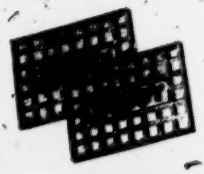
FLARE-TOP EAT-IT-ALL

CRISP-A-LITE and DELUXE DISPENSERS

FLARE-TOP CONES
Dripless and reinforced. Holds one No. 30, 24, 20 or 16 scoop. 2" wide at top; 4⅞" tall.

DUBLE-HEDER CONES
Takes two or three No. 30, 24 or 20 scoops; up to ½-pint sliced brick. 3" wide at top; 5" tall.

JUNIOR TORCH CONES
The perfect "sampler". Can be filled with spoon or No. 40 scoop. 1-3/16" wide at top; 4⅛" tall.



BUDDY WAFFLE
For sliced brick or dipped ice cream. Has finished edge. Size 3½"x2¾"x 5/16".

#10 TAKE-OUT CUPS
Approximately ⅞ to 1 fluid oz. capacity — one No. 16 to 30 dip. 1-15/16" wide at top; 2½" tall.

#20 TAKE-OUT CUPS
1¼ fluid oz. capacity. Holds one No. 30, 24, 20 or 16 scoop. 1-15/16" wide at top; 2¾" tall.

#25 TAKE-OUT CUPS
Capacity: 1½ fluid oz. — one No. 30, 24, 20 or 16 dip. 1-15/16" wide at top; 2¾" tall.

#3 DELICIA CUPS
2¼ fl. oz. cup, or one No. 20, 16 or 12 dip; two No. 30 or 24 dips. 2-1/16" wide at top; 2⅛" tall.

#8 EAT-IT-ALL CUPS
Capacity: 1¼ fluid oz. — holds one No. 12, 16 or 20 scoop; two smaller dips. 2⅛" wide at top; 3" tall.

#35 EAT-IT-ALL CUPS
Holds 1¾ fluid oz. or two No. 24 or 30 dips; one No. 10 to 20 dips. 2⅛" wide at top; 3-1/16" tall.

#55 EAT-IT-ALL CUPS
2½ fluid oz. capacity—one No. 10, 12 or 16 scoop or two smaller dips. 3⅛" wide at top; 3½" tall.

#40 EAT-IT-ALL CUPS
Holds 2½ fluid oz. or two No. 20, 24 or 30 dips; one No. 10 to 20 dip. 2-5/16" wide at top; 3-3/16" tall.

#60 TALL KUPS
Holds 3 fluid oz.—one No. 10 dip, two No. 12 or three No. 20, 24 or 30. 2⅛" wide at top; 3⅛" tall.

#62 SUPER KUPS
Holds 6 fluid oz.—two No. 10, 12 or 16 dips, three 20's or four 24's or 30's. 2⅛" wide at top; 4⅝" tall.

The distinctive cake flavor and appetizing appearance of Flare-Top/Eat-It-All cones and cups is the result of quality cake ingredients ingredients and careful, even baking.

Exclusive construction features provide more resistance to breakage in shipping and handling . . . allow perfect baking for better eating qualities.

The cradle-rib construction baked into the bottom of every Take-Out and Eat-It-All Cup . . . an exclusive feature of Flavorized Cake Cups. These patented cross ribs reinforce the body of the cup and provide a strong flat base and firmer body . . . permit perfect, uniform baking for tasty crispness and even, golden brown texture . . . prevent contents from reaching and softening bottom of the cup.

Redesigned for greater efficiency and better appearance, Crisp-A-Lite and Deluxe Dispensers are modern fountain fixtures that provide quick, one-at-a-time dispensing . . . minimize breakage and furnish point-of-purchase displays that mean extra sales. Available for use with Flare-Top Cones, Take-Out Cups and Eat-It-All Cups.

Crisp-A-Lite Dispenser illustrated here. Deluxe Dispenser is same style and construction but without electric crisper and window illumination. When ordering Dispensers, please specify proper stock number.

Eagle Cone Corporation

805 EAST 140th STREET · NEW YORK 54, N. Y.

Phone CYpress 2-3000

WHOLESALE PRICE LIST

OCTOBER 3, 1955

All Prices Subject to Change Without Notice

The quantity ordered for any one ... determines price bracket. Items may be combined to reach ... price bracket.

PRODUCT ILLUSTRATIONS AND DESCRIPTIONS SHOWN ON REVERSE SIDE

BRAND	Packing	Unit	25 Cases or More	15 to 24 Cases	10 to 14 Cases
Flare-TOP Flavor-ized Dripless Cones	10/100	M.	$5.35	$5.40	$5.50
Flare-TOP Flavor-ized Dripless Cones	...	...	5.35	5.40	5.50
Crispo Special Cones (Re-inforced Top)	...	...	5.15	5.20	5.30
My-T-Hi Cones (Re-inforced Top)	...	...	5.15	5.20	5.30
Crispo Cup Cones	10/100	M	4.95	5.00	5.10
Crispo Cup Cones	4/250	M	4.95	5.00	5.10
Duble Heder Cake Cones	2/300	600	5.00	5.05	5.15
Kreem Kups	4/250	M	5.55	5.60	5.70
No. 10 Take-Out Cups (disp. pk.)	10/100	M	5.55	5.60	5.70
No. 20 Take-Out Cups (disp. pk.)	6/100	600	3.35	3.40	3.50
No. 20 Take-Out Cups	2/300	600	3.35	3.40	3.50
No. 25 Take-Out Cups (disp. pk.)	10/100	M	5.55	5.60	5.70
No. 25 Take-Out Cups	2/300	600	3.35	3.40	3.50
No. 8 Eat-It-All Cake Cups (disp. pk.)	6/100	600	4.80	4.85	4.95
No. 35 Eat-It-All Cake Cups (disp. pk.)	6/100	600	5.20	5.25	5.35
No. 35 Eat-It-All Cake Cups	2/300	600	5.20	5.25	5.35
No. 40 Eat-It-All Cake Cups (disp. pk.)	6/100	600	5.20	5.25	5.35
No. 40 Eat-It-All Cake Cups	2/300	600	5.20	5.25	5.35
No. 45 Eat-It-All Cake Cups (disp. pk.)	...	600	5.35	5.40	5.50
No. 55 Eat-It-All Cake Cups (disp. pk.)	...	528	4.90	4.95	5.05
No. 55 Eat-It-All Cake Cups	2/300	600	5.20	5.25	5.35
No. 60 Tall Kups	2/300	600	7.00	7.05	7.15
No. 65 Super Kups (7 oz.)	4/100	400	7.55	7.60	7.70
Square Waffles	4/500	2M.	8.00	8.05	8.15
DISPENSER DEAL AND DISPENSERS					
Flare-TOP Dispenser Deal No. 36 (600 Flare-TOPS—1 Deluxe Dispenser)			6.00	6.05	6.15
No. 8 Eat-It-All Dispenser Deal No. 58 (400 No. 8 Eat-It-All Cups—1 Deluxe Dispenser)			6.00	6.05	6.15
Eat-It-All Dispenser Deal No. 406 (400 No. 40 Eat-It-All Cups—1 Deluxe Dispenser)			6.00	6.05	6.15
No. 25 Take-Out Dispenser Deal No. 250 (600 No. 25 Take-Out Cups—1 Deluxe Dispenser)			6.00	6.05	6.15
Flare-TOP Dispenser Deal No. 736 (600 Flare-TOPS—1 Counter Dispenser)			5.90	5.95	5.95
No. 10 Take-Out Dispenser Deal No. 710 (600 No. 10 Take-Out Cups—1 Counter Dispenser)			5.90	5.95	5.95
No. 8 Eat-It-All Dispenser Deal No. 710 (400 No. 8 Eat-It-All Cups—1 Counter Dispenser)			5.90	5.95	5.95
No. 40 Eat-It-All Dispenser Deal No. 740 (400 No. 40 Eat-It-All Cups—1 Counter Dispenser)			5.90	5.95	5.95
No. 25 Take-Out Dispenser Deal No. 725 (600 No. 25 Take-Out Cups—1 Counter Dispenser)			5.90	5.95	5.95

No. 1 (Flare-TOP and Nos. 2, 10 and 25 Take-Out), 103 (Nos. 3 Eat-It-All) and 104 (Nos. 35, 40, 45 & 55 Eat-It-All) Deluxe Dispensers

101 (Flare-TOP and Nos. 2, 10 and 25 Take-Out), 701 (No. 8 Eat-It-All) and 704 (Nos. 35, 40, 45 & 55 Eat-It-All) Counter Dispensers

MINIMUM PREPAID SHIPMENT 10 Cases. A 5% allowance will be made from the 25 case price on 5 assorted cases.

PLAINTIFFS' EXHIBIT 46

Carvel STORES
OF NEW YORK, INC.
80 WOODWORTH AVENUE, YONKERS, NEW YORK - Yonkers 9-7200
... PAUL, KANSAS, NEW YORK - White Plains 6 6204

DEPT. IC

September 3, 1957

Dear Friend:

Recently, several stores increased their prices on many items; five cents on sundaes, etc. Some have increased their ten cent cone to fifteen cents.

While this may give greater return and seems to offer no resistance from the customer, please remember that the person who has only ten cents to spend per child will find a place to spend it. You may not know until it is too late that your business has lost its appeal to children and their parents.

The signs used by some stores to increase prices explained cost increases, etc. and thanked their customers for their patronage. However, some used the Carvel trade mark instead of their own name and franchise license number. This name and trade mark is licensed to you for use only in the sale of ice cream and for no other use. You are paying, through your franchise, a license fee for the use of this name and trade mark in the sale of Carvel approved ice cream and ice cream items only.

To protect our name and trade mark, we must request that you do not reproduce it in any form or use it for any other purpose, as all other rights and licenses are reserved by the trade mark owners.

Our Supply Department has blank signs which may be used should you care to increase or decrease your prices.

Sincerely,

Fred Vettel, Jr.

FVJR:ma

PLAINTIFFS' EXHIBIT 47

CERTIFIED MAIL #181
RETURN RECEIPT REQUESTED

June 24, 1959

Mr. & Mrs. Lester N. Modick
Carvel Store #368
Main and Kensington Streets
Hartford, Connecticut

Dear Mr. and Mrs. Modick:

As attorneys for CARVEL STORES OF NEW YORK, INC., we have been informed that you have installed and are using unauthorized equipment in the operation of your Carvel Store and are selling unapproved products as follows:

1. An unauthorized three tap soda beverage machine installed inside your Carvel Store.

2. An unauthorized milk vending machine installed upon the premises of your Carvel Store.

3. Using unapproved paper cups for soda beverages.

4. Selling a soda beverage other than those approved by Carvel.

In your Franchise Agreement, #000649, dated February 19, 1957, you specifically agreed that from your Carvel Store and in connection with the use of the Carvel name and trade-marks you would sell only Carvel's Frozen Products and other Carvel approved items and that you would purchase from Carvel or Carvel approved sources your entire requirements of the ingredients of products offered to your retail customers for consumption.

The sale of a soda beverage and milk products other than those approved or sold by Carvel constitutes a substantial violation of this provision of the Agreement.

You also agreed that the equipment contained in your Carvel Store and upon your Carvel premises would be in accordance with the Carvel specifications contained in your Standard Operating Procedure Manual. Furthermore, although you are permitted to install a beverage vending machine, it is expressly provided that this is to be a one cup soda vending machine, and located outside your Carvel Store, as approved by Carvel.

The installation of the unapproved soda beverage machine inside your Carvel Store and the location of an unapproved milk vending machine outside your Carvel Store constitute substantial violations of these provisions of your Franchise Agreement.

You have further agreed that you would use only those paper goods approved by Carvel to dispense products from your Carvel Store. The use of unapproved paper soda cups does not meet the requirements of this provision of your Agreement.

Your Franchise Agreement was designed for the protection of your valuable interests in your own Carvel Store, and to safeguard Carvel's name and trade-marks, each of the many Franchised Carvel Dealers and the General Public. You may be assured that our client will not hesitate to exercise all of the provisions of that Agreement safeguarding its name and trade-marks, as well as exercising all its legal and equitable remedies for the protection thereof, and asserting any and all claims for damages arising out of violations of the Agreement.

In view of these circumstances, CARVEL STORES OF NEW YORK, INC., hereby requires that you cooperate in this matter and comply with the provisions of your Frahchise Agreement in the following manner:

1. Remove the unapproved soda dispensing equipment and milk vending machines from your Carvel premises.

2. Discontinue the sale of unauthorized soda beverages and milk products.

3. Use only approved paper soda cups.

Although this letter is written in firm clear terms setting forth Carvel's position in this matter, it is also written in a spirit of cooperation and the desire to prevent misunderstandings and possible unpleasantness. We would appreciate, therefore, your acknowledgement of this letter and some assurance of your understanding and cooperation concerning the matter discussed herein.

Very truly yours,

AGREE & MARCIANTE

Norman S. Isko

NSI:jv
CC: Cert. Mail #182
Mr. & Mrs. L. Modic
2739 Main Street
Hartford, Connecticut

PLAINTIFFS' EXHIBIT 48

80 WOODWORTH AVENUE
YONKERS, NEW YORK

DECEMBER 21, 1956

MR. AND MRS. JAMES PIERCE
CARVEL STORE #348
3245 RISING SUN AVENUE
PHILADELPHIA, PENNSYLVANIA

DEAR MR. AND MRS. PIERCE:

THIS OFFICE IS ADVISED THAT YOU ARE PRESENTLY EMPLOYING YOUR CARVEL STORE PREMISES FOR THE SALE OF CHRISTMAS TREES. WE REFER YOU TO YOUR DEALER'S FRANCHISE AGREEMENT, SPECIFICALLY PARAGRAPH 4th WHICH PROVIDES THAT NO SALES OF ANY KIND MAY BE CARRIED ON FROM THE CARVEL STORE PREMISES, UNLESS EXPRESSLY SO PROVIDED FOR.

WE TRUST THAT UPON RECEIPT OF THIS NOTICE, YOU WOULD IMMEDIATELY CEASE THE VIOLATION OF UNAUTHORIZED SALES.

PLEASE BE FURTHER ADVISED THAT IF THERE ARE ANY FURTHER VIOLATIONS OF THE FRANCHISE, IN REGARD TO SALES OF UNAUTHORIZED PRODUCTS, THAT WE SHALL PROCEED VIGOROUSLY TO TERMINATE THE DEALERS FRANCHISE AGREEMENT ENTERED INTO BETWEEN YOURSELVES AND THE CARVEL STORES OF NEW YORK, INC.

VERY TRULY YOURS,

CARVEL STORES OF NEW YORK, INC.

PRF:TP

PHILIP R. FRANKLIN
LEGAL DEPARTMENT

CC/ MR. FRED VETTEL, JR.
MR. GEORGE CLARK

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

80 Woodworth Avenue
Yonkers, New York

[illegible], 1959

James & Rita Pierce
Carvel Store #243
5245 Rising Sun Avenue
Philadelphia, Pennsylvania

Dear Mr. & Mrs. Pierce:

The report of our Supervisor, dated April 23rd, 1959, shows that as of that date you are in substantial breach and violation of your Dealer's Franchise Agreement, #000448, dated April 12th, 1956, between yourself and this Corporation, in that:-

A. You are handling, selling, displaying and dealing in unauthorized, non-CARVEL products and ingredients, to wit: potato chips, peanut butter crackers, and an unauthorized non-CARVEL orange drink which is being dispensed from your CARVEL soda barrel;

B. You are using and displaying certain red and green lights which are not authorized in connection with your Store.

All of the above are in substantial breach and violation of your said Dealer's Franchise Agreement, #000448, dated April 12th, 1956, and the Standard Operating Procedures Manual, which is a part thereof. In connection with this, we respectfully bring to your attention Paragraphs 1., 2., 3., and FIRST, FOURTH, FIFTH, SIXTH, EIGHTH, SEVENTEENTH, SEVENTEENTH, TWENTY-SECOND, and TWENTY-FIFTH, as well as other Paragraphs of this Franchise Agreement and Standard Operating Procedures Manual which are applicable.

Under these circumstances, you are hereby given notice pursuant to Paragraph SEVENTEENTH of said Dealer's Franchise Agreement, #000448, that you have 48 hours in which to cure and remedy each and every defect above set forth, and cease handling, selling, displaying and dealing in unauthorized non-CARVEL products and ingredients and displaying the said unauthorized red and green display lights, and in the event of your failure to so cure and remedy each and every defect, CARVEL may, at its option, terminate your said Franchise Agreement, and you shall thereupon have no further rights thereunder, or in the alternative, we may seek to enforce any and other of the rights and remedies which are available in law and equity for damages and other relief.

We ask your cooperation in this matter, but must, at this time, assure you that in the event of your failure to cure the breaches and defects above set forth, this Corporation will take the necessary legal action to protect its interests and the valuable trademark rights involved.

Very truly yours,

CARVEL STORES OF NEW YORK, INC.

By Robert J. Thalle

/dd

CC: MMR - Mrs. & Mrs. James Pierce
190 N. Wellsmas Avenue
Philadelphia, Pa.

PLAINTIFFS' EXHIBIT 51

MORGAN, LEWIS & BOCKIUS
COUNSELORS AT LAW
2107 FIDELITY-PHILADELPHIA TRUST BUILDING
PHILADELPHIA 9, PA.

WASHINGTON, D. C. OFFICE

August 8, 1960

In re: Carvel Stores of New York, Inc. vs. James & Rita Pierce, C.P. Philadelphia County, No. , Term 1960, No. In Equity

Daniel J. Ryan, Esq.
1507 Packard Building
Philadelphia 2, Pa.

Dear Mr. Ryan:

This will confirm our telephone conversation of today wherein you informed me that it will not be necessary for Carvel Stores of New York, Inc. to institute further proceedings against James and Rita Pierce to require them to terminate their advertising and sales of the items mentioned below inasmuch as they now agree that upon receipt of this letter stating specifically the activities upon their part which Carvel contends constitute a breach of their franchise agreement, they will cease and desist therefrom.

Please be advised therefore that the activities to which Carvel takes exception under the franchise agreement are the advertising for sale, the handling, dealing in and selling of the following items as described by this dealer, namely:

1. Chocolate covered frozen bananas
2. Sno Cones
3. Coca Cola
4. Rainbows

It is also understood and agreed that the Pierces will see to the removal of the coca cola machine.

In accordance with this understanding we shall not institute the subject proceedings in equity.

Very truly yours,

John R. McConnell

m
enc.

PLAINTIFFS' EXHIBIT 53

REGISTERED MAIL
RETURN RECEIPT REQUESTED

80 Wordsworth Ave.
Yonkers, N.Y.

#309

May 21, 1958

Mr. Sol Medens
Leland Rd. & Elmwood Ave.
Philadelphia, Pa.

Dear Mr. Medens:

This is to formally notify you that an inspection of your store on July 14, 1958 disclosed that you are in breach of your Dealer's Franchise Agreement #000330 in having:

(1) Failed to maintain, operate and conduct your store in accordance with the terms of the contract and the Standard Operating Procedure Manual,

(2) In your possession at the store, unauthorized products, such as Potato Chips, Lime Dip Top, Lemon Dip Top;

(3) Displaying, offering for sale, and selling from the store, unauthorized products,

(4) Displayed by signs and advertisements on the Carvel store, unauthorized products.

This notice is being given you pursuant to the terms of the Franchise Agreement and, in particular, Paragraph Seventeenth thereof.

This is to further advise you that under the terms of the contract we have the option of:

(1) Terminating your contract, demanding the return of all identification equipment;

(2) Seeking damages;

(3) Injoining the sale or offering for sale, any products under the Carvel name or from the Carvel Store which are not approved Carvel products;

(4) Of demanding the assignment of your present lease upon termination and cancellation of contract;

(5) Of repurchasing the freezers in accordance with Paragraph Sixteenth;

(6) Of maintaining by court order, or otherwise, upon cancellation or termination of the contract, your being restricted from engaging directly or indirectly in the sale of any frozen dairy products within an area of one (1) mile in either direction from the present premises, for a period of five (5) years from date of termination.

Please be advised that we will strictly enforce any rights upon which we exercise the option.

Very truly yours,

CARVEL STORES OF PENNSYLVANIA INC.

Robert E. Beardsley

Robert E. Beardsley
Chief Supervisor

REB:eb

CC:
MR & Reg. Mail
6119 Lyons Ave. Apt. 13
Philadelphia, Pa.

Reg. Mail:

Island Rd. & Elmwood Ave.
Philadelphia, Pa.

PLAINTIFFS' EXHIBIT 55

CERTIFIED MAIL
RETURN RECRIPT REQUESTED

80 Woodworth Avenue
Yonkers, New York

May 1st, 1959

Mr. Sol Rodens
Carvel Store #209
Island Road & Elmwood Avenue
Philadelphia, Pennsylvania

Dear Mr. Rodens:

The report of our Supervisor, dated April 22nd, 1959, shows that as of that date you are in substantial breach and violation of your Dealer's Franchise Agreement, #000530, dated April 11th, 1955, between yourself and this Corporation, in that:-

A. You are handling, selling, displaying and dealing in unauthorized, non-CARVEL products and ingredients, to wit: potato chips, pretzels, peanut crackers, and butterscotch and strawberry dip toppings.

B. You are handling, selling, displaying and dealing in unauthorized paper goods, to wit: certain 24 ounce paper cup, and certain insulated bags.

C. You have permitted and continue to permit the Roadside Cone to remain in a state of disrepair, thus doing damage to one of the important identifying symbols and trademarks of CARVEL.

D. In addition, your account presently shows a balance of $405.43. While some of the items included in this account may be C.O.D. items in process of collection, there is the sum of $273.32 which has been delinquent and in default since September, 1958, and you therefore have failed to make prompt payment upon presentation of invoices.

All of the above are in substantial breach and violation of your said Dealer's Franchise Agreement, #000530, dated April 11th, 1955, and the Standard Operating Procedures Manual, which is a part thereof. In connection with this, we respectfully bring to your attention Paragraphs 1., 2., 3., and FIRST, FOURTH, FIFTH, SIXTH, SEVENTH, EIGHTH, NINTH, SIXTEENTH, SEVENTEENTH, TWENTY-SECOND, and TWENTY-FIFTH, as well as other Paragraphs of this Franchise Agreement and Standard Operating Procedures Manual which are applicable.

Under these circumstances, you are hereby given notice pursuant to Paragraph SEVENTEENTH of said Dealer's Franchise Agreement, #0008330, that you have 48 hours in which to cure and remedy each and every defect above set forth, and cease handling, selling, displaying and dealing in unauthorized non-CARVEL products and ingredients, and unauthorized paper goods, and take affirmative steps to immediately repair the CARVEL roadside Cone, and in the event of your failure to so cure and remedy each and every default and breach, we may, at our option, terminate your said Franchise Agreement, and you shall thereupon have no further rights thereunder, or in the alternative, we may seek to enforce any and other of the rights and remedies which are available in law and equity for damages and other relief.

We ask your cooperation in this matter, but must, at this time, assure you that in the event of your failure to cure the breaches and defects above set forth, this Corporation will take the necessary legal action to protect its interests and the valuable trademark rights involved.

Very truly yours,

CARVEL STORES OF PENNSYLVANIA, INC.

By Robert J. Shallis
Shallis

/dd

CC: RHR - Mr. Sol Rodems
6119 Lyons Ave.,
Apt. 13
Philadelphia, Pa.

PLAINTIFFS' EXHIBIT 57

Carvel STORES
OF NEW YORK, INC.
80 WOODWORTH AVENUE, YONKERS, NEW YORK · YOnkers 9-7200
95 SOUTH CENTRAL AVENUE, HARTSDALE, NEW YORK · WHite Plains 6-8200

80 WOODWORTH AVE.
REPLY TO YONKERS, N.Y.

JUNE 19, 1959

MR. AND MRS. PAUL GIBERMAN
STORE #256
311 SNOWBALL DRIVE
LEVITTOWN, PA.

DEAR MR. AND MRS. GIBERMAN:

WE HAVE JUST RECEIVED YOUR SUPERVISOR'S REPORT DATED JUNE 12, 1959 WHICH INDICATES UNAUTHORIZED PAPER CUPS ARE IN USE, IN YOUR STORE.

YOUR FRANCHISE AGREEMENT PROVIDES THAT YOU WILL USE ONLY THOSE PAPER PRODUCTS MADE IN ACCORDANCE WITH THE CARVEL STANDARDS IN CONNECTION WITH THE OPERATION OF THE CARVEL STORE AND ANY PRODUCTS SOLD THEREFROM. THE USE OF UNAPPROVED PAPER CUPS WOULD CONSTITUTE A VIOLATION OF THIS PROVISION OF THE FRANCHISE AGREEMENT.

IN VIEW OF THE ABOVE WE REQUEST, THEREFORE, THAT YOU DISCONTINUE THE USE OF THE UNAPPROVED MERCHANDISE DESCRIBED.

WE LOOK FORWARD TO YOUR COOPERATION IN THIS MATTER.

SINCERELY YOURS,

CARVEL STORES OF NEW YORK, INC.

Charles Marino

CHARLES MARINO
CHIEF SUPERVISOR

CM:NB

PLAINTIFFS' EXHIBIT 58

Carvel STORES
OF NEW YORK, INC.

80 WOODWORTH AVENUE, YONKERS, NEW YORK · YOnkers 9-7200
91 SOUTH CENTRAL AVENUE, HARTSDALE, NEW YORK · WHite Plains 6-8200

REPLY TO 80 Woodworth Ave.
Yonkers, N.Y.

July 14, 1959

Mr. & Mrs. Paul Giberman
Store #256
311 Snowball Drive
Levittown, Pennsylvania

Dear Mr. & Mrs. Giberman:

We have just received your supervisor's report dated July 9, 1959 which indicates that you are using unauthorized paper goods, such as, unapproved 10 ounce cups and lids.

Your Franchise Agreement provided that you will use and sell only Carvel products in connection with the operation of your Carvel store and any of the Carvel items sold therefrom.

Sale of any products from the Carvel store not authorized or approved by Carvel would constitute a violation of this provision of your Franchise Agreement.

In view of the above, we request, therefore, that you discontinue the use or sale of the unapproved merchandise described.

We look forward to your cooperation in this matter.

Sincerely yours,

CARVEL STORES OF NEW YORK, INC.

Charles Marino

Charles Marino
Chief Supervisor

CM:mb

PLAINTIFFS' EXHIBIT 59

AGREE & MARCIANTE
COUNSELORS AT LAW

PHILIP AGREE
ARTHUR E. MARCIANTE, JR.

YONKERS 9-6700

19 JAROCOCK PLACE
YONKERS, N. Y.

Aug 4th, 1959.

CERTIFIED MAIL #
RETURN RECEIPT REQUESTED

Mr. & Mrs. Paul Giberman
Carvel Store #256
Route 413, nr. Plumridge Pass
Bristol, Pa.

Dear Mr. & Mrs. Giberman:

As attorneys for CARVEL STORES OF N. Y., INC., we have been informed that you are violating your Franchise Agreement #000558, dated September 27th, 1955, in that you are using unauthorized paper cups in connection with the sale of products from your Carvel Store.

You expressly agreed in your Franchise Agreement that you would equip your Store with paper goods approved by CARVEL and made in accordance with CARVEL standards. The use of unauthorized paper cups constitutes a direct violation of this provision.

Your Franchise Agreement was designed for the protection of your interests in your own Carvel Store and to safeguard the name, trademarks, and interests of CARVEL and each of the many other CARVEL franchised Dealers. You may be assured that our client, CARVEL STORES OF NEW YORK, INC. will act without delay to protect its name, trademarks and interests upon any breach of that agreement.

We earnestly solicit your cooperation in this matter, and in order to avoid any possible inconvenience or unpleasantness, we would appreciate your acknowledgment of this letter, and assurance that you will abide by the terms of your Franchise Agreement and use only CARVEL approved paper goods in connection with your use of the CARVEL name and tradenarks and the sale of products from your CARVEL Store.

Very truly yours,

AGREE & MARCIANTE

By: _____
Norman S. Isko

NSI:tkl

CC CERTIFIED MAIL # RETURN RECEIPT REQUESTED
Mr. & Mrs. Paul Giberman
311 Snowball Drive
Levittown, Pa.

PLAINTIFFS' EXHIBIT 60

AGREE & MARCIANTE
COUNSELORS AT LAW

PHILIP AGREE
ARTHUR E. MARCIANTE, JR.
NORMAN S. ISKO

YONKERS 9-6700

19 BABCOCK PLACE
YONKERS, N. Y.

September 14, 1959

Monroe, Verderame & Bortnar, Esqs.
205 Radcliffe Street
Bristol, Pennsylvania

Attn: Peter J. Verderame, Esq.

Re: Paul S. Giberman
Carvel Store #256

Gentlemen:

With reference to your letter of September 3, 1959, it would appear that you are under a mistaken impression as to Mr. Giberman's obligations to our client under his Franchise Agreement.

With reference to the use of unapproved ten (10) ounce cups in Carvel Stores, we understand that Mr. Giberman has discontinued the use of such cups and will hereafter use the prescribed twelve (12) ounce paper cups. Please note that the use of twelve (12) ounce cups was not prescribed for a ten (10) liquid ounce beverage, but was intended to contain a twelve (12) ounce serving of soda beverage. The Standard Operating Procedure Manual makes provision for a twelve (12) ounce drink only, not for a ten (10) ounce drink. For this reason, Carvel Stores operating in accordance with their Franchise Agreement and Standard Operating Procedure Manual serve only twelve (12) ounce drinks notwithstanding the type of beverage served by their competitors.

As for the flavor syrups used in Carvel Stores, these products were designed especially for use with ice cream. Since no fruit flavored beverage has been approved by the Board of Governors of the Carvel organization for use in Carvel Stores, Mr. Giberman should have no problem with the syrups available to him. We respectfully bring to your attention the fact that all products served to customers of Carvel Stores are sold under the name and trademarks of Carvel. It is not possible, you see, to pass off any product from a Carvel Store under any description other than the following: "This is a Carvel product". In view of these circumstances, we shall expect Mr. Giberman to discontinue serving any soda beverage other than the authorized Carvel Cola and Carvel Root Beer and also discontinue his use of unapproved flavor syrups.

With regard to the state of the record in the Prothonotary's office concerning Mr. Giberman's secured transactions, we will take the necessary steps to clarify the same.

As for the hardening room equipment, we advise Mr. Giberman to formally notify Carvel of the nature of the trouble with complete detail in order that possible repairs may be made, if Carvel is responsible for same.

Should you have any questions concerning the matters discussed herein, we shall be happy to discuss the same with you.

Very truly yours,

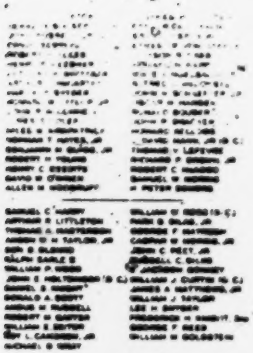
AGREE & MARCIANTE

Norman S. Isko

Norman S. Isko

NSI:jv

PLAINTIFFS' EXHIBIT 61



MORGAN, LEWIS & BOCKIUS
COUNSELORS AT LAW
2107 FIDELITY-PHILADELPHIA TRUST BUILDING
PHILADELPHIA 9, PA

January 2, 1962

REGISTERED MAIL
RETURN RECEIPT REQUESTED

Mr. and Mrs. Paul Giberman
Carvel Store #256
Route 413
Plumridge Pass
Bristol Township, Pennsylvania

Re: Franchised Stores of New York, Inc.

Dear Mr. and Mrs. Giberman:

On behalf of our client, Franchised Stores of New York, Inc. (formerly Carvel Stores of New York, Inc.)("Carvel"), we are writing with regard to your substantial and continued violations of the terms of the franchised agreement of September 27, 1955, into which you and Carvel voluntarily entered. We are informed that in spite of recent conversations with Mr. Marino, a Carvel supervisor, you have continued your previous violations.

The violations to which we refer and to which we understand are continuing are:

Sale of unapproved pretzels, cakes and crackers;

Sale of frozen chocolate coated bananas, Tootsie Roll ice cream popsicles, and Flying Saucers on sticks;

The use of unauthorized paper goods, including cups with either no name or the name of another organization, and plastic spoons; and

Use of unapproved signs on your windows advertising water ice and sherbert.

Therefore, on behalf of Carvel, it is necessary for us to inform you that unless you cease the sale of unauthorized products and the use of the above-described paper cups, spoons and advertising, it shall be necessary to take appropriate steps in order to compel your compliance with the terms of the contract.

In this latter connection you may be interested to know that in similar cases involving other Carvel dealers in the Philadelphia area who persisted in comparable violations, the Court of Common Pleas of Philadelphia County has issued orders against those dealers enjoining them from any further violations and directing them to comply with the terms of their franchise agreements.

One of the supervisors will visit your store in the near future and we hope very much for all concerned that his report will indicate that legal action is unnecessary.

Very truly yours,

Morgan, Lewis & Bockius

sac

PLAINTIFFS' EXHIBIT 63

Carvel STORES
OF PENNSYLVANIA, INC.
80 WOODWORTH AVENUE, YONKERS, NEW YORK · YOnkers 9-7200
95 SOUTH CENTRAL AVENUE, HARTSDALE, NEW YORK · WHite Plains 6-8200

REPLY TO 80 Woodworth Ave.
Yonkers, New York

March 3, 1958

Mr. Sol Rodens
Carvel Store #209
8119 Lyons Avenue
Apt. 13
Philadelphia, Pennsylvania

(3)

Dear Mr. Rodens:

Thank you very much for your recommendation with regard to a soda machine for installation in Carvel stores, which was received in this office February 27, 1958.

As soon as all stores have had an opportunity to submit their recommendations and intentions with regard to this matter and we have had an opportunity to review all of the recommendations, we will be happy to advise you as to what decision has been reached with regard to soda dispensers in Carvel stores. Until that time, of course, no soda dispenser will be approved for use in any Carvel store.

We appreciate very much your interest in writing to us with regard to this matter.

Sincerely yours,

CARVEL MERCHANDISING DIVISION

Fred Vettel

FVJ:mb

Fred Vettel, Jr.

Carvel STORES
OF PENNSYLVANIA, INC.
80 WOODWORTH AVENUE, YONKERS, NEW YORK · YOnkers 9-7200
95 SOUTH CENTRAL AVENUE, HARTSDALE, NEW YORK · WHite Plains 6-6200

REPLY TO 80 Woodworth Ave.
Yonkers, New York

May 5, 1958

Mr. Sol Rodens
Carvel Store #209
Island Road & Elmwood Avenue
Philadelphia, Pennsylvania

Dear Mr. Rodens:

On February 27, 1958, we received an indication from you of your interest in installing equipment to dispense Carvel sodas from your store and advised you in our letter of March 3rd, that we would inform you as to the results of the accumulated suggestions with regard to soda equipment.

As you know from the Bulletin that was forwarded to all stores over date of April 30, 1958, the sale of Carvel Cola, Carvel Root Beer and Carvel Ice Cream Sodas from Carvel Retail Stores has been approved by the trademark owners of the "Carvel" name.

If you are still interested in adding these new Carvel products to your operation, we would suggest that you contact Mr. Robert Spaulding, by either writing to him at 80 Woodworth Avenue, Yonkers, N. Y., or calling him at YOnkers 9-6700, and he will be pleased to make arrangements to make the sale of these new items possible from your store, and at the same time, give you any additional information with regard to specifications, products, etc.

Sincerely yours,

CARVEL STORES OF PENNSYLVANIA, INC.

Fred Vettel, Jr.

FVJ:mc

Carvel STORES
OF NEW YORK, INC.

80 WOODWORTH AVENUE, YONKERS, NEW YORK · YOnkers 9-7200
95 SOUTH CENTRAL AVENUE, HARTSDALE, NEW YORK · WHite Plains 6-8200

REPLY TO 80 WOODWORTH AVENUE
YONKERS, NEW YORK

MAY 23, 1958

MR. SOL RODENS
CARVEL STORE #209
ISLAND ROAD AND ELMWOOD AVENUE
PHILADELPHIA, PENNA.

DEAR MR. RODENS:

WITH REFERENCE TO OUR TLEPHONE CONVERSATION OF RECENT DATE IN WHICH WE DISCUSSED THE POSSIBLE INSTALLATION OF A CARVEE BARREL IN YOUR STORE, I WISH TO BRING TO YOUR ATTENTION THAT THE INFORMATION I GAVE TO YOU WITH REGARDS TO CERTAIN SPECIFICATIONS FOR THE BARREL WERE MERELY SUPPLIED AS A MEANS OF BETTER DESCRIBING THE APPEARANCE AND FUNCTION OF THE BARREL TO YOU.

THIS INFORMATION WAS NOT INTENDED TO BE GIVEN OR RECEIVED AS EXACT AND COMPLETE SPECIFICATIONS FOR THE EQUIPMENT NOR AS APPROVED SPECIFICATIONS FOR A POSSIBLE PURCHASE BY YOU.

EACH AND EVERY PURCHASE OF EQUIPMENT FOR YOUR CARVEL STORE CAN BE MADE ONLY AFTER WRITTEN APPROVAL OF THE SPECIFICATIONS FROM US FOR EACH AND EVERY PURCHASE OF EQUIPMENT.

VERY TRULY YOURS,

CARVEL STORES OF NEW YORK, INC.

Harry J. Aufiero

HARRY J. AUFIERO

HAA/BMS

PLAINTIFFS' EXHIBIT 64

Carvel

September 3, 1958

Mr. & Mrs. Frank McCoy
Carvel Store #251
2784 Main Street
Glastonbury, Connecticut

Dear Mr. & Mrs. McCoy:

On a number of occasions in the past, certain Carvel Store owners have permitted the sale of Christmas trees from their premises. In all such instances, immediate action has been taken to protect the name of Carvel, in which you have such a substantial interest.

You must realize your Franchise permits the sale of Carvel products only. The sale of any non-Carvel product, including Christmas trees, from the premises upon which your Carvel Store is located, represents a substantial violation and breach of the terms of the Franchise Agreement, the Lease and the Standard Operating Procedure Manual, and causes serious harm to the Carvel Trademarks.

This letter has been sent as a courteous, but firm, notice in advance that Carvel will have no alternative but to take all steps necessary, without further notice, to prevent and seek all damages resulting from such acts, in order to protect its good name and trademarks, as well.

The name "Carvel" is a trademarked name and may not be used except with the specific authorization of the trademark owner. You are permitted to use the name "Carvel" only in accordance with the specific provisions of your Franchise Agreement. We are sure that we do not need to tell you of the extensive and valuable rights which are involved in trademark ownership.

We believe that your cooperation and adherence to the terms of the Franchise Agreement will act to benefit and protect your business and your investment.

Very truly yours,

CARVEL DARI-FREEZE STORES, INC.

Stan W. Townsend

Stan W. Townsend

SWT:jg

PLAINTIFFS' EXHIBIT 65

Carvel

DARI-FREEZE STORES INC.

ONE OF AMERICA'S FASTEST GROWING FRANCHISE CHAINS
80 WOODWORTH AVENUE, YONKERS, NEW YORK • YOnkers 9-7200

REPLY TO

SEPTEMBER 17, 1957

MR. & MRS. FRANK McCOY
CARVEL STORE #251
276 MAIN STREET
GLASTONBURY, CONNECTICUT

DEAR MR. & MRS. McCOY:

WE HAVE JUST RECEIVED YOUR SUPERVISOR'S REPORT DATED SEPTEMBER 13, 1957 AND WERE PLEASED TO NOTE THAT THE GENERAL OPERATION OF YOUR STORE CONTINUES TO BE GOOD.

THERE IS ONE ITEM ON THE REPORT TO WHICH WE DIRECT YOUR ATTENTION, AND THAT IS THE UNAPPROVED EQUIPMENT WHICH YOU PRESENTLY HAVE IN THE SALES ROOM OF YOUR STORE. IN ORDER TO PRESERVE THE UNIFORMITY OF CARVEL STORES AND THEIR OPERATION, WE MUST REQUEST THAT YOU GIVE US YOUR COOPERATION IN CONFINING YOUR NEEDS TO CARVEL APPROVED EQUIPMENT ONLY. WE LOOK FORWARD TO THE REMOVAL OF THE UNAPPROVED CIGARETTE MACHINE AT YOUR EARLIEST CONVENIENCE SO THAT YOUR STORE MAY ONCE AGAIN RESUME ITS RIGHTFUL PLACE AMONG THE OTHER EXCELLENTLY OPERATED CARVEL STORES.

WE FEEL CONFIDENT THAT YOU WILL APPRECIATE THE NECESSITY OF THIS UNIFORMITY AND, THEREFORE, TAKE THIS OPPORTUNITY TO THANK YOU FOR YOUR COOPERATION IN MAINTAINING IT.

SINCERELY YOURS,

CARVEL DARI-FREEZE STORES, INC.

Robert Beardsley

ROBERT BEARDSLEY
CHIEF SUPERVISOR

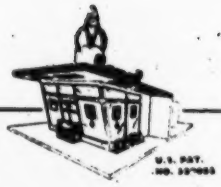
RB:JG

Walk in Store
Have machine inside
store

PLAINTIFFS' EXHIBIT 66

Carvel STORES
OF NEW YORK, INC.

80 WOODWORTH AVENUE, YONKERS, NEW YORK · YOnkers 9-7200
98 SOUTH CENTRAL AVENUE, HARTSDALE, NEW YORK · WHite Plains 6-8200



REPLY TO 80 WOODWORTH AVENUE
YONKERS, NEW YORK

JUNE 10TH, 1957

MR. AND MRS. JAMES PIERCE
STORE #243
5245 RISING SUN AVENUE
PHILADELPHIA, PA.

DEAR MR. AND MRS. PIERCE:

WE HAVE JUST RECEIVED YOUR SUPERVISOR'S REPORT, DATED JUNE 5TH, 1957.

WE NOTE IN YOUR REPORT THAT YOU HAVE INSTALLED ON THE PREMISES OF YOUR CARVEL STORE A SOFT DRINK BOTTLE DISPENSING UNIT, AND THAT, IN THE SALES ROOM OF YOUR STORE, YOU HAVE INSTALLED SHELVES WHICH DO NOT CONFORM TO THE ORIGINAL PLANS AND SPECIFICATIONS FOR YOUR STORE.

WE RESPECTFULLY DIRECT YOUR ATTENTION TO OUR DEALERS FRANCHISE AGREEMENT, NUMBER I UNDER DEFINITIONS, WHICH READS " THIS CARVEL STORE SHALL AT ALL TIMES BE MAINTAINED AND OPERATED IN ACCORDANCE WITH THE SPECIFICATIONS, PROVISIONS OF THE MANUAL, AND THE DEALER SHALL HAVE NO RIGHT TO MAKE ANY CHANGES OR ALTERATIONS IN AND TO THE SAID CARVEL STORE, NOT AUTHORIZED IN WRITING BY CARVEL. ". FURTHER, PARAGRAPH SIXTEENTH READS " THE DEALER SHALL HAVE THE RIGHT TO INSTALL ONE SOFT DRINK CUP DISPENSING VENDING MACHINE - - - AT SUCH PLACE OR PLACES AT THE OUTSIDE OF THE STORE ONLY AS MAY BE APPROVED BY CARVEL. "

WE HAVE PREVIOUSLY WRITTEN TO YOU WITH REGARD TO THE BOTTLE DISPENSING SOFT DRINK MACHINE, AND REQUESTED YOUR COOPERATION IN HAVING IT REMOVED FROM THE PREMISES, AND CONFINING YOUR OPERATION TO OUR AGREEMENT. YOUR FAILURE TO ACCEDE TO OUR REQUEST NOW MAKES IT NECESSARY TO CALL YOUR ATTENTION TO PARAGRAPH SEVENTEEN OF OUR FRANCHISE AGREEMENT, AND TO ADVISE YOU THAT, UNLESS THE ABOVE NOTED DEFICIENCIES IN YOUR OPERATION ARE CORRECTED WITHIN 48 HOURS OF RECEIPT OF THIS NOTIFICATION,

WE SHALL BE FORCED TO TAKE ALL STEPS NECESSARY TO PROTECT OUR INTERESTS IN THE CARVEL NAME AND TRADE MARK.

WE LOOK FORWARD TO YOUR COOPERATION IN THIS MATTER, AND SINCERELY HOPE THAT YOU WILL SO OPERATE YOUR STORE IN THE FUTURE AS TO CONFORM TO THE REQUIREMENTS OF OUR AGREEMENTS.

SINCERELY YOURS,

CARVEL MERCHANDISING DIVISION

Fred Vettel

FRED VETTEL, JR.

FVJ:DD

PLAINTIFFS' EXHIBIT 68

FRANKLIN & AGREE
COUNSELORS AT LAW

PHILIP R. FRANKLIN
PHILIP AGREE

YONKERS 9-6700

19 BABCOCK PLACE
YONKERS, N. Y.

August 1, 1967.

CERTIFIED MAIL
RETURN RECEIPT REQUESTED
SPECIAL DELIVERY

Mr. & Mrs. James Pierce
Carvel Store #243
4245 Rising Sun Avenue
Philadelphia, Pa.

Dear Mr. & Mrs. Pierce:

We are the attorneys for Carvel Stores of New York, Inc. A recent letter by Mr. Agree of our firm, has advised you that your installation of a bottle dispensing soft drink machine at your store constituted a breach of your Franchise Agreement and the Standard Operating Procedural Manual. We have been advised that as of this date the violation in question has not been corrected.

Please take notice that, pursuant to Paragraph 17 of your Franchise Agreement you are hereby given forty-eight hours after receipt of this notice, to remove the unauthorized equipment from your store.

Let me add that these requirements of your Franchise Agreement are for your protection, not only for your own store but for the entire corporation, and standards upon which it is founded.

Under the circumstances I trust that in order not to impair your very important rights under the Franchise Agreement you will correct the violation above set forth and will in the future run your store in accordance with all the terms of the Franchise Agreement.

Very truly yours,

FRANKLIN & AGREE

Arthur Marciante Jr.

Arthur Marciante, Jr.

AM:dl

FRANKLIN & ADDEE
19 Bardock Place
Yonkers, N. Y.

YONKERS, NY
AUG 6 1963

SPECIAL DELIVERY

RETURN RECEIPT REQUESTED

4245 Rising Sun Ave.

Mr. & Mrs. James Pierce
Carvel Store #243
4245 Rising Sun Avenue
Philadelphia, Pa.

CERTIFIED MAIL
RETURN RECEIPT REQUESTED
SPECIAL DELIVERY

CERTIFIED

C-203

SPECIAL DELIVERY
CERTIFIED MAIL

PLAINTIFFS' EXHIBIT 76

Carnel

STORE REPORT
PRODUCTS QUALITY CONTROL

DATE 6-26-6 STORE NO. 341
ADDRESS 711 Grand Street Portland
TIME ARRIVED 5:15 PM TIME LEFT 7:30 PM
HOURS SPENT WITH STORE OWNER 2½

III. PRODUCTS QUALITY CONTROL	Poss. Score	DEDUCT for Def.
A. EMPTY MIX CANS		
1. Clean	2	
2. Properly Drained	1	
3. Properly Stored	1	
B. FRONT DISPLAY COUNTER		
1. All Items Made According to S.O.P.	5	
2. All Items Attractively Made	2	
C. FREEZERS		
1. Properly Operated U	5	
2. Product Tasty	2	
3. Product Firm	3	
4. Product Separated	20	
5. Cones Fresh and Crisp	2	
D. WALK IN BOX		
1. All Unflavored Cans Sealed	15	
2. All Unflavored Cans Dated on Carnel Tag		
3. Mix Processed According to S.O.P.	8	
4. Fresh Frozen Strawberries on Hand	1	
5. All Opened Containers Covered	3	
E. COMMISSARY		
1. Good variety on hand	1	
2. Dated	1	1
3. Old Merchandise being used first	1	
4. Neatly Stored	1	
5. Any Unapproved Commissary	75	
F. PAPER SUPPLIES		
1. Complete Assortment on Hand	1	
2. Properly Stored	1	
3. Any Unapproved Paper Goods	40	
G. SALES ITEMS		
1. Cones properly dressed according to S.O.P.	2	
2. Cones proper weight	5	
3. Sundaes properly made according to S.O.P.	5	
4. Sundaes proper weight	5	
5. Banana Splits properly made according to S.O.P.	5	
6. Banana Splits proper weight	3	
7. Thick Shakes properly made according to S.O.P.	5	
8. Thick Shakes proper weight	5	
9. Good Variety Sundae Toppings	3	
Column Total		

G. SALES ITEMS (Cont'd)	Poss. Score	DEDUCT for Def.
10. Sundae Toppings Fresh	5	
11. Pre-Pak Pies Fresh	2	
12. Pre-Pake Product Not Separated	10	
13. Lollipolooses Fresh	2	
14. Lollipolooses Proper Weight	2	
15. Poppolooses Fresh	2	
16. Poppolooses Proper Weight	2	
17. Flying Saucers Fresh	2	
18. Flying Saucers Proper Weight	2	
19. Thick Shake Base Stocks	4	
20. Empty Containers Pre-Chilled	2	
21. Powdered Sugar Pre-Chilled and Used	2	
22. Any Unapproved Items Sold	20	20
H. ALL STORE PERSONNEL		
1. Sufficient Number	1	
2. Wearing Proper Uniform	3	3
3. Wearing Hats	3	3
4. Properly trained	5	
5. Have Clean Shaven	5	
6. Hands Clean	5	
7. Nails Clean	5	
I. SANITATION		
1. Freezers Properly Sanitized Daily or start of business	10	
2. Chlorine Solution Properly Prepared & in continual use	5	
3. Utensils Properly Sanitized	10	
4. Adequate Sanitary Precautions:		
a. Making and Bagging Flying Saucers	2	
b. Making and Bagging Lollipolooses	2	
c. Making and Bagging Poppolooses	2	
d. Making and Bagging Brown Bosser	2	
e. Making and Boxing Tarts	2	
f. Making and Boxing Turnovers	2	
g. Making and Boxing Eclairs	2	
h. Making and Boxing Sno Balls	2	
i. Making and Boxing Pies	2	
j. Making and Boxing Cakes	2	
k. Making and Boxing Logs	2	
l. Opening Mix Cans	2	
m. Flavoring Mix	2	
n. Filling Hoppers	2	
J. GENERAL		
1. Any Unapproved Equipment	20	
2. No Smoking Permitted	3	
3. S.O.P. Available in Store	3	
Column Total		

GRAND TOTAL POSSIBLE	321
DEDUCT POINTS UNAVAILABLE (All Columns)	-
GRAND TOTAL POSSIBLE THIS STORE	321
DEDUCT POINTS LOST (All Columns)	23
GRAND TOTAL ACTUAL	298
PERCENTAGE (Divide Possible This Store into Actual)	93%

VIOLATIONS: You are hereby notified that you are in breach of your Franchise Agreement in having ~~selling~~ selling on your store Extra Tater Chips

I am having selling would please we sell Apples on your Carnel parking area.

THIS NOTICE IS GIVEN TO YOU PURSUANT TO THE TERMS OF YOUR FRANCHISE AGREEMENT WHICH PROVIDES FOR A CORRECTION OF ANY BREACH WITHIN _____ DAYS OF THIS NOTICE.

Supervisor C. Wilson Store Owner Jan Lee

PART No. 9

414

Carvel

STORE REPORT
MANAGEMENT AND MERCHANDISING

DATE 4/21/60 STORE NO. 941
ADDRESS 980 Rte 37 Bristol, Conn.
TIME ARRIVED 5 1/2 PM TIME LEFT 7:30 PM
HOURS SPENT WITH STORE OWNER 2 hr

	Poss. Score	DEDUCT for Def.
IV. MANAGEMENT AND MERCHANDISING		
A. All necessary permits and licenses available and posted	10	
B. SALES PERSONNEL		
1. Courteous	5	
2. Large Cones Suggested	3	
3. Daily Specials Suggested	3	
4. Take Home Items Suggested	3	
5. Freezer Fresh Items Suggested	5	
6. Lapel Badges Featuring Daily Special in Use	5	
C. WINDOWS		
1. Signs Posted According to S.O.P.	5	
2. Magnetic Sign Holders in Use	1	
3. Window Ledge Displayed According to S.O.P.	2	
D. SIGNS		
1. Complete assortment of posters on hand	4	
2. Complete assortment of Cutouts on hand	4	
3. All signs neatly stored	1	
4. All signs and cutouts in good condition	4	
5. Any Unapproved Signs	15	
E. FRONT COUNTER		
1. Store Hours Posted	2	
2. Pies Displayed	3	
3. Pupperlooses Displayed	4	
4. Tarts Displayed	3	
5. Sno Balls Displayed	3	
6. Turnovs Displayed	2	
7. Flying Saucers Displayed	4	
8. Eclairs Displayed	3	
9. Lollapalooses Displayed	4	
10. Logs Displayed	3	
11. Cakes Displayed	3	
12. All Items Priced	2	
13. Napkins Available	2	
14. Plastic Spoons Available	3	
F. SALES PROMOTION		
1. Plastic 5 oz. Dishes Used	3	3
2. Plastic Sundae Dishes Used	5	5
3. Plastic Banana Barge Dishes Used	3	
4. Carry Out Trays in use	3	
5. White Bags Used	3	
6. Good Assortment of Pre-Pak Pints	2	
Column Total		10

	Poss. Score	DEDUCT for Def.
F. SALES PROMOTION (Cont'd)		
7. Pre-Pak Pint Flavors Displayed	2	
8. C-Thru Lids in use on Pre-Pak Pints	5	
9. Sufficient service supplies available in sales room	1	
G. STORE HOURS		
1. Open According to S.O.P.	1	
2. Close According to S.O.P.	1	
H. ADVERTISING		
1. Advertising Regularly	10	
2. Weekly Specials Featured	10	
3. Features Changed Daily	5	
Column Total		
GRAND TOTAL POSSIBLE	170	
DEDUCT POINTS UNAVAILABLE (All Columns)		
GRAND TOTAL POSSIBLE THIS STORE	170	
DEDUCT POINTS LOST (All Columns)	20	
GRAND TOTAL ACTUAL	150	
PERCENTAGE (Divide Possible This Store into Actual)	88%	

RECOMMENDATIONS:

1. Malt Machines should be removed from parking area
2. Potatoes Chips should be removed from your Store

Jane Doe
Store Owner

C. Wilson
Supervisor

2

PART No. 3

PLAINTIFFS' EXHIBIT 80

Your Carvel BULLETIN

CARVEL MERCHANDISING DIVISION • 80 WOODWORTH AVENUE • YONKERS, N. Y.

ON THE RECOMMENDATION OF THE BOARD OF GOVERNORS THE SALE OF CARVEL COLA, CARVEL ROOT BEER, CARVEL ICE CREAM SODAS FROM CARVEL RETAIL ICE CREAM STORES HAS BEEN APPROVED BY THE TRADE MARK OWNERS OF THE "CARVEL" NAME.

THOSE DEALERS DESIRING TO INSTALL SODA EQUIPMENT IN THEIR STORES ARE REQUIRED TO EXECUTE A RIDER AMENDMENT TO THE CARVEL FRANCHISE AGREEMENT TO INCLUDE CARVEL SODA PRODUCTS AS BEING SUBJECT TO ALL OF THE TERMS AND CONDITIONS OF THEIR EXISTING CARVEL FRANCHISE AGREEMENT.

SHOULD YOU BE INTERESTED, PLEASE COMMUNICATE WITH CARVEL, 80 WOODWORTH AVENUE, YONKERS, NEW YORK, TO ARRANGE FOR THE EXECUTION OF THE NECESSARY RIDER AMENDMENT TO YOUR EXISTING CARVEL FRANCHISE AGREEMENT.

UNDER NO CONDITION IS A SODA OR ANY ITEM OTHER THAN CARVEL FROZEN DAIRY PRODUCTS TO BE SOLD WITHOUT THE NECESSARY LICENSE.

FVJ:JG
4/30/58

REGISTERED MAIL
RETURN RECEIPT REQUESTED

PLAINTIFFS' EXHIBIT 81

Your Carvel BULLETIN

CARVEL MERCHANDISING DIVISION • 80 WOODWORTH AVENUE • YONKERS, N. Y.

IMPORTANT IMPORTANT IMPORTANT IMPORTANT IMPORTANT

IT HAS COME TO OUR ATTENTION THAT SALESMEN FROM SOME ORGANIZATIONS ARE REPRESENTING TO STORE OWNERS THAT CARVEL HAS GRANTED APPROVAL TO THE SODA DISPENSING EQUIPMENT WHICH THEY ARE ATTEMPTING TO SELL.

THIS IS NOT TRUE.

CARVEL HAS GRANTED NO BLANKET APPROVAL FOR ANY EQUIPMENT OR TO ANY FIRM.

TO PREVENT ANY LOSS OF DEPOSIT OR CASH INVESTMENT OF YOURS, BE CERTAIN THAT YOU FIRST OBTAIN WRITTEN APPROVAL FROM THIS OFFICE BEFORE YOU MAKE ANY COMMITMENTS FOR EQUIPMENT PURCHASES. PLEASE SUBMIT COMPLETE AND DETAILED SPECIFICATIONS TO THIS OFFICE FOR REVIEW PRIOR TO ANY PURCHASE OF ANY EQUIPMENT.

PLAINTIFFS' EXHIBIT 83

Your Carvel BULLETIN

CARVEL MERCHANDISING DIVISION 80 WOODWORTH AVE., YONKERS NEW YORK

VOLUME II. No. 4

LOLLAPALOOZA. . . . . .LOLLAPALOOZA BRANDED STICKS #767 ARE NOW AVAILABLE AT $1.16 PER THOUSAND, PACKED 1,000 TO A BOX, 10 THOUSAND TO A CARTON. MAY BE ORDERED IN EITHER 1,000 OR 10,000 QUANTITIES.

LOLLAPALOOZA BAGS #769, SAMPLE ATTACHED ARE NOW AVAILABLE AT $1.62 PER THOUSAND, PACKED 1,000 TO A BOX OR 10,000 TO A CARTON. MAY ALSO BE ORDERED IN QUANTITIES OF 1,000 OR 10,000.

PLEASE NOTE THESE ARE THE ONLY APPROVED STICKS AND BAGS FOR USE WITH THE NEW LOLLAPALOOZA. FREE POSTERS WITH INITIAL ORDERS.

TORPEDO RECEPTACLE BAGS. . . .#832 LARGE SIZE BAGS FOR USE IN THE LARGE TORPEDO RECEPTACLE ARE NOW AVAILABLE PACKED IN QUANTITIES OF 125 AT $8.00 PER CASE.

PLAINTIFFS' EXHIBIT 89

Your Carvel BULLETIN

CARVEL MERCHANDISING DIVISION • 80 WOODWORTH AVENUE • YONKERS, N. Y.

VOLUME VI NO. 23

Enclosed is your Carvel Daily Feature Calendar for the month of July.

We know that you have realized the advantages that the June calendar is producing for your store. We look forward to your continued cooperation in following the recommendations of the calendar for the month of July.

SWT:mb
6/12/59
Encs.

Carvel

DAILY FEATURE SCHEDULE
JULY

COPYRIGHT BY CARVEL 1959

WINDOW	MONDAY	TUESDAY	WEDNESDAY	THURSDAY	FRIDAY	SATURDAY	SUNDAY
1 AND 6	**"4th OF JULY" DISPLAY**		CARVEL IS FRESH (LARGE POSTER)	THICK SHAKE (CUT-OUT)	BANANA BARGE (CUT-OUT)	TORTONI (CUT-OUT)	TARTS (CUT-OUT)
2 AND 5	**IN DISPLAY COUNTER**		PIE (DAILY FEATURE)	CARVEL WEIGHS MORE	TART - DAILY FEATURE	QUART - DAILY FEATURE	BANANA BARGE (SUNBURST)
3 AND 4				**DISPLAY G.O. FLAGS ON BUILDING**			
A AND B	(REFER TO "4TH OF JULY" BULLETIN)		CHOC. SUNDAE (SUNBURST) LOG (CUT-OUT) 1	REPEAT FLYING SAUCER (CUT-OUT) 2	REPEAT ECLAIR (CUT-OUT) 3	REPEAT CAKE (CUT-OUT) 4	REPEAT SNO-BALL (CUT-OUT) 5
1 AND 6	CARVEL WEIGHS MORE (LARGE POSTER)	HALF-GALLON (DAILY FEAT.)	LOLLAPALOOZA (STREAMER)	*NOTE: Check Supply of Banana Barge Dishes* PECAN TREE (DAILY FEATURE)	BUTTERSCOTCH SUNDAE (DAILY FEATURE)	PEACH SUNDAE (CUT-OUT)	QUART w. FRESH FRUIT (DAILY FEATURE)
2 AND 5	STRAW. SUNDAE (SUNBURST)	C.M.P. (SUNBURST)	CAKE (SUNBURST)	LOG (CUT-OUT)	SNO-BALL (SUNBURST)	T.S. FLOAT (SUNBURST)	RASB. SUNDAE (SUNBURST)
3 AND 4	**THICK SHAKE FLOAT WEEK - FEATURE LARGE POSTER (Thick Shake Float 35¢)**						
A AND B	THICK SHAKE FLOAT (CUT-OUT) 6	FRUIT-PACK - PINT (CUT-OUT) 7	TARTS (CUT-OUT) 8	BANANA BARGE (CUT-OUT) 9	PAPAPALOOZA (CUT-OUT) 10	FLYING SAUCER (CUT-OUT) 11	LOG (CUT-OUT) 12
1 AND 6	HOT FUDGE (DAILY FEATURE)	PINT (DAILY FEATURE)	TORTONI (DAILY FEATURE)	*NOTE: DECORATE STORE WITH LARGE BUNCHES OF BANANAS* HALF GALLON (DAILY FEATURE)	TARTS (CUT-OUT)	LOLLAPALOOZA (CUT-OUT)	CAKE (CUT-OUT)
2 AND 5	PIE (CUT-OUT)	ECLAIR (SUNBURST)	BANANA BARGE (SUNBURST)	CHOC. SUNDAE (SUNBURST)	PINEAPPLE SUNDAE (DAILY FEATURE)	WILD CHERRY (DAILY FEAT.)	WALNUT (DAILY FEATURE)
3 AND 4	**BANANA BARGE WEEK FEATURE LARGE**				**B.B. POSTER (Banana Barge 45¢)**		
A AND B	BANANA BARGE (CUT-OUT) 13	BANANA BARGE (CUT-OUT) 14	SNO-BALL (CUT-OUT) 15	THICK SHAKE (CUT-OUT) 16	CAKE (CUT-OUT) 17	BANANA BARGE (CUT-OUT) 18	BANANA BARGE (CUT-OUT) 19
1 AND 6	CARVEL IS FRESH (LARGE POSTER)	FRUIT-PACK - PINT (CUT-OUT)	THICK SHAKE (CUT-OUT)	PAPALOOZA (SUNBURST)	THICK SHAKE FLOAT (DAILY FEATURE)	CAKE (CUT-OUT)	LOG (CUT-OUT)
2 AND 5	FLYING SAUCER (SUNBURST)	TOAST. COCO. MARSH. (D.F.)	CAKE (SUNBURST)	PECAN TREE (DAILY FEAT.)	PIE (SUNBURST)	PINT (DAILY FEATURE)	BANANA BARGE (SUNBURST)
3 AND 4	**CHERRY SUNDAE WEEK FEATURE LARGE POSTER (Cherry Sundae 25¢)**						
A AND B	SNO-BALL (CUT-OUT) 20	C.M.P. SUNDAE (CUT-OUT) 21	PEACH SUNDAE (CUT-OUT) 22	LOG (CUT-OUT) 23	TORTONI (CUT-OUT) 24	ECLAIR (CUT-OUT) 25	FLYING SAUCER (CUT-OUT) 26
1 AND 6	LOLLAPALOOZA (SUNBURST)	TARTS (DAILY FEATURE)	PEACH SUNDAE (SUNBURST)	LOG (CUT-OUT)	THICK SHAKE (CUT-OUT)		
2 AND 5	C.M.P. SUNDAE	CHOC. SUNDAE (CUT-OUT)	FLYING SAUCER (D. F.)	TORTONI (DAILY FEATURE)	PIE (SUNBURST)	SEE AUGUST CALENDAR FOR REST OF WEEK . . .	
3 AND 4	**STRAWBERRY SUNDAE WEEK FEATURE LARGE POSTER (Strawberry Sundae 25¢)**						
A AND B	STRAW. (CUT-OUT) 27	STRAW. (CUT-OUT) 28	BANANA BARGE (CUT-OUT) 29	FRUIT-PACK - PINT (CUT-OUT) 30	PECAN TREE (CUT-OUTS) 31		
1 AND 6							
2 AND 5		REMEMBER LAPEL BADGES HELP YOU SELL YOUR DAILY FEATURE					
3 AND 4							
A AND B							

CARVEL DEFENDANTS' EXHIBIT C-7

STATE OF CONNECTICUT
FOOD AND DRUG COMMISSION
STATE OFFICE BUILDING
HARTFORD

Date fee rec'd .....
License No. .....
Amt. fee rec'd. .....
(For office use only)

Application For License To Manufacture Frozen Desserts and Frozen Desserts Mix For Sale

Application is hereby made, in accordance with the provisions of Section 3913 of the General Statutes, as amended, for a license to manufacture and sell frozen desserts and frozen dessert mix in Connecticut.

Check kinds of products sold: ☒ Ice Cream ☐ Frozen Custard ☐ Ice Milk ☐ Milk Sherbet ☐ Ices or Ice Sherbet ☐ Frozen Dessert Mix

Total number of gallons manufactured in Connecticut for the twelve months' period previous to Jan. 1st.
Frozen desserts ...None... Frozen dessert mix mfg. ...None... Total ...None...
Total number of gallons manufactured outside of Connecticut and sold in this state for the twelve months' period previous to Jan. 1st.
Frozen desserts ...None... Frozen dessert mix ...None... Total ...None...
Are any products sold to others for resale? No. Brands or trade names under which product is sold ...Dari-Freeze...
Street North Broad Street City Meriden
State New Haven Conn. County ..... Township .....
Date December 10, 1955 Signed James & Elizabeth Ossola
Name of Owner or manager
Amt. fee inclosed $1.00 By .....

James & Elizabeth Ossola

(Detach this and keep for your information)

Application must be filed for each plant and proper fees paid based upon total number of gallons of Frozen Desserts manufactured or sold in Connecticut, and Frozen Dessert Mix, sold as such in Connecticut.

Fee for wholesale manufacturer

(A person who manufactures Frozen Desserts, any of which is sold to another for resale.) — $25.00 for 25,000 gallons or less. 65 cents for each additional thousand gallons or fraction thereof.

Fee for retail manufacturer

(Any manufacturer of Frozen Desserts who is not defined as a wholesale manufacturer.) — $1.00 for 1,000 gallons or less. $1.00 for each additional thousand gallons or fraction thereof.

Statements showing gallonage manufactured for each month to January first must be in this office before license can be renewed. Licenses expire Feb. 28th. All workers must have unexpired health certificates.

STATE OF CONNECTICUT
FOOD AND DRUG COMMISSION
STATE OFFICE BUILDING
HARTFORD

DUPLICATE

License to Manufacture Frozen Desserts and Frozen Dessert Mix for Sale

This Side for Office Use Only

Fee received
$.....
Dated
.....

Expires Feb. 28 annually unless sooner revoked for cause.

State ..... County ..... Township .....

is licensed to manufacture frozen desserts and frozen dessert mix for sale in Connecticut in accordance with the provisions of Section 3915 of the General Statutes Revision of 1949, (as amended)

Post this license in a conspicuous place
Not transferable

The Commonwealth of Massachusetts

DEPARTMENT OF PUBLIC HEALTH

APPLICATION FOR LICENSE TO MANUFACTURE FROZEN DESSERTS OR ICE CREAM MIX

To the Board of Health of Commonwealth of Massachusetts

In accordance with the provisions of section 65H of Chapter 94 of the General Laws, inserted by Chapter 378 of the Acts of 1934, and the regulations made thereunder, the undersigned hereby applies for a license for the WHOLESALE / RETAIL manufacture of frozen desserts or ice cream mix and submits the following information.

1. Full name of applicant Bernard and Gertrude Susser, and Shirley Schwartz

2. Business address 135 Walnut Street in Springfield, Massachusetts, County of Hampden, Massachusetts. Store # 247

3. If applicant is an individual
   - Full name .....
   - Residence .....

3a. If applicant is a partnership, full name and residence of all partners.

Bernard and Gertrude Susser, and Shirley Schwartz Residing at 60 Plaza Street, Brooklyn, NewYork

3b. If applicant is a corporation
   - State of incorporation .....
   - Date of incorporation .....
   - Principal office .....

(This copy is to be retained for the applicant's file.)

Form PH-FP-17. 2500 (3)-6-12-39[illegible]

Full name and address of

President .....

.....

Treasurer .....

.....

Clerk .....

.....

4. Location of Plants 135 Walnut Street in Springfield, Massachusetts

County of Hampden, Massachusetts

5. Names of brands and trade or corporation name, if any under which the products are to be sold.

CARVEL DARI-FREEZE STORES, INC.

6. Number and capacity of freezers three (3)

7. Is the mix purchased? yes If so, from whom purchased?

H. P. Hood & Son of 500 Rutherford Avenue, Boston, Massachusetts

8. Is the mix pasteurized or not? The mix is pasteurized

9. Number of gallons of frozen desserts and ice cream mix sold as such made during last calendar year none

10. Is the water supply public or not? no

11. Is the plant constructed and equipped as provided in the regulations? yes

12. Have you received a copy of the regulations? yes

I hereby certify that I will manufacture frozen desserts or ice cream mix only from pure and wholesome ingredients and only under sanitary conditions.

Signature Bernard Lusser

City or town Haratdale, N. Y. Date July 9, 1954

A ICATION FOR LICENSE TO MANUFACTU AND FOR
REGISTRATION OF ICE CREAM, ETC.

Commonwealth of Pennsylvania
Department of Agriculture
Bureau of Foods and Chemistry
Harrisburg, Pennsylvania

April 11, , 19 55

Present License No.

Gentlemen:

Application is hereby made for a license to manufacture ice cream, custard ice cream, french ice cream, french custard, frozen ice confections, frozen sherbet confections, sherbet, ice, or fruit ice and for the registration of the following brands, flavors, forms, types and kinds of such products to be sold in the Common wealth of Pennsylvania for a period beginning with the date of registration and ending December 31, 19 55 .

LIST EACH INDIVIDUAL BRAND, FLAVOR, FORM, TYPE AND KIND OF PRODUCT

Vanilla, chocolate, strawberry, Pineapple, raspberry, cherry, peach.
Dari Freeze soft ice cream.

The undersigned certifies that during the calendar year preceding the year for which this application for license is being made, the following amount of the products for which registration is requested was or will be produced: 6,000 gallons.

The undersigned further certifies and agrees, in consideration of being issued a license to manufacture the above listed products, to comply with all the provisions of Act Number 483, approved May 20, 1949.

This application is made on behalf of Sol Rodens
Name of Business

Location of Plant N.W. corner Island Road and Elmwood Avenue., City or Town Philadelphia

County Philadelphia, State Pennsylvania

The undersigned, certifies according to Law, that the statements set forth herein are true and correct.

George Plant — X Sol Rodens
Sign (In Ink)

Official Title

Witness — Print Name as above

Submit CERTIFIED CHECK or Money Order payable to COMMONWEALTH OF PENNSYLVANIA

(Retain Duplicate Copy for your Files)

For Office Use:
New License issued (Number) Date

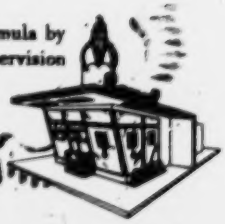
CARVEL DEFENDANTS' EXHIBIT C-8

Carvel

Purity Pledge

. . . all pure, fresh, laboratory-tested products, manufactured under special formula by sanitary equipment and served in hygienically clean stores. Strict Carvel supervision maintains these high standards for your protection.

YOUR LOCAL CARVEL DEALER

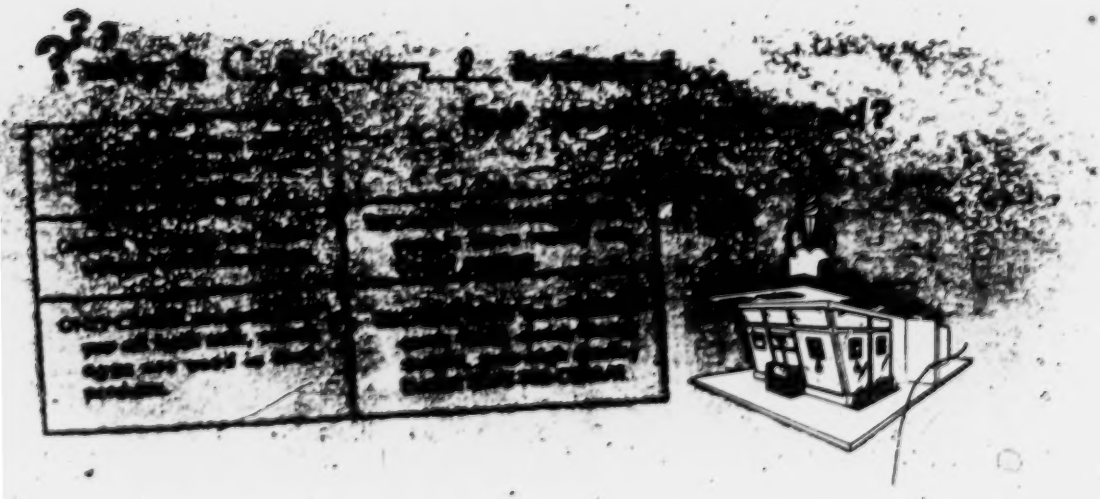


Carvel

Sec. 34.66, P. L. & R.
U. S. POSTAGE
PAID
BROOKLYN, N. Y.
Permit No. 1

OCCUPANT
41 CORNELL ST
MANCHESTER CONN

Something Special!



2 FOR THE PRICE OF 1 SALE THIS FRIDAY

...at the GRAND OPENING of this new Carvel Ice Cream Shop

2 FOR 1 TICKET

THIS IS YOUR TICKET TO RECEIVE ANY TWO ITEMS REGULARLY SOLD IN THIS CARVEL STORE FOR THE PRICE OF ONE ON OPENING DAY ONLY.
DEALER RESERVES RIGHT TO LIMIT QUANTITIES

Carvel DESSERT HEADQUARTERS

TRY SOME OF THESE TASTY TAKE-HOME ITEMS . . . ALL PERFECT FOR DESSERT

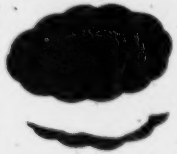
All items made on the premises

20¢ EACH

ICE CREAM CLAIR
BOX OF 4 75¢

ICE CREAM PIE
$1.00

ICE CREAM LOG $1.50

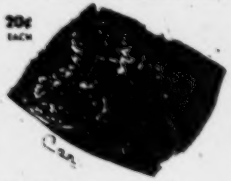


10¢ EACH

FLYING SAUCER
BOX OF 8 75¢

20¢ EACH

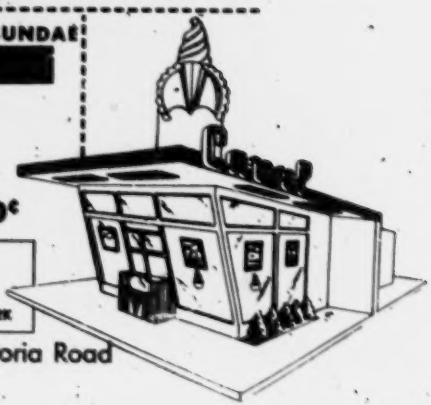
TARTS
BOX OF 4 75¢



20¢ EACH

TORTONES
BOX OF 4 75¢

GIANT SUNDAE
FRUIT
ICE CREAM
FRUIT
ICE CREAM
YOUR CHOICE OF FLAVORS
50¢



Carvel FEATURES A LARGE ASSORTMENT OF TAKE-HOME ITEMS
INCLUDING: PINTS 45¢ . . . QUARTS 85¢ . . . ½ GALLONS $1.50

CARVEL STORES ARE OWNED BY YOUR NEIGHBORS . . . UNDER FRANCHISE TO CARVEL HARTSDALE, NEW YORK

Joseph and Lillian Phelan

Cor. of Center Street and Victoria Road
Manchester, Conn.

NO SUBSTITUTE FOR QUALITY

NO SUBSTITUTE

for Carvel

SUCCEED WITH Carvel

(Imitated but never duplicated)

Carvel • HARTSDALE, NEW YORK

Competent Behind-the-Scenes Supervision Sets the Stage for the Selling Success of Carvel Store Owners.

UNIFORMITY . . .

The contributing factors to the success of your Carvel store and products are centered in the person of your neighboring Carvel store owner, who operates your local store with the backing of thorough training and constant assistance by the supervisory staff.

Through suggestion, demonstration, and actual performance, the supervisors keep the Carvel store owner continuously advised of new operating procedures, merchandising methods, and products. Thus, the sale of uniform, superior quality merchandise to every customer is assured.

Through your local neighbor and Carvel store owner the parent organization guarantees the fulfillment of the pledge of the Carvel chain that "All pure, fresh, special formula, laboratory-tested products manufactured by sanitary equipment will be served from hygienically clean stores" at all times.

As a result, it can truthfully be said:

Carvel • IMITATED BUT NEVER DUPLICATED.

1—TASTE-TEST. Supervisor takes "sample" in his remark, like himself "with Carvel."

2—Carvel supervisor instructing clerk on proper method of preparing Thick Shake.

3—After each use, milk cans are thoroughly cleansed. When they reach the milk plant for refilling, they are sanitized and sterilized again before use for the next supply.

4—Standard uniform for the lady Carvel store owners differs only with a "sanitized" cap recently introduced.

IN UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

BERNARD SUSSER, GERTRUDE SUSSER and SHIRLEY SCHWARTZ,
Plaintiffs-Appellants,

—against—

CARVEL CORPORATION, ET AL., Defendants-Appellees.

LESTER N. MODICK and HARRIET H. MODICK,
Plaintiffs-Appellants,

—against—

CARVEL STORES OF NEW YORK, INC., ET AL.,
Defendants-Appellees.

MARTHA M. McCOY and FRANK T. McCOY,
Plaintiffs-Appellants,

—against—

CARVEL CORPORATION, ET AL., Defendants-Appellees.

MATTHEW SEU and JANE L. SEU, Plaintiffs-Appellants,

—against—

CARVEL CORPORATION, ET AL., Defendants-Appellees.

PAUL S. GIBERMAN and GERTRUDE GIBERMAN,
Plaintiffs-Appellants,

—against—

CARVEL STORES OF NEW YORK, INC., ET AL.,
Defendants-Appellees.

JOSEPH P. PHELAN, Plaintiff-Appellant,

—against—

CARVEL STORES OF NEW YORK, INC., ET AL.,
Defendants-Appellees.

JAMES P. PIERCE, RITA PIERCE, LYLE FREDERICK, LEROY M. FREDERICK, ALFRED MUELLER and SOL RODENS, Plaintiffs-Appellants,

—against—

CARVEL STORES OF NEW YORK, INC., ET AL.,
Defendants-Appellees.

JOSEPH PAZDRO and YOLANDA PAZDRO, Plaintiffs-Appellants,

—against—

CARVEL STORES OF NEW YORK, INC., ET AL.,
Defendants-Appellees.

JAMES OSSOLA and ELIZABETH G. OSSOLA,
Plaintiffs-Appellants,

—against—

CARVEL STORES OF NEW YORK, INC., ET AL.,
Defendants-Appellees.

STIPULATION—Filed May 2, 1963

IT IS HEREBY STIPULATED AND AGREED, by and between the attorneys for the parties hereto, as follows:

1. Appellants hereby withdraw and consent to the dismissal of that portion of each of their pending appeals taken from the judgments entered in the United States District Court for the Southern District of New York in each of the above captioned cases dismissing the claims

for relief based upon allegations of fraud and deceit in each of said actions.

2. Withdrawal and dismissal of the appeals taken from that portion of the judgments relating to the aforesaid fraud claims is without prejudice to that portion of appellants' pending appeals which relate to the judgments dismissing their respective claims based upon alleged violations of the antitrust laws.

3. Appellants further withdraw and consent to dismissal of all the pending appeals as to each and every one of the individual defendants named in the above captioned cases without prejudice to the rights of such individual defendants to recover any and all costs that may be taxed in their favor as a result of any and all of the proceedings in the District Court; however, none of the individual defendants herein shall be entitled to recover additional costs by reason of the instant appeals having been taken against them and withdrawn by this stipulation.

4. All of the appeals taken from the judgments upon the antitrust claims in the above captioned cases shall be consolidated for docketing, printing briefing and argument and this Court shall issue one mandate upon such appeals.

5. Appellants' time to docket the consolidated record on appeal shall be extended to May 7, 1963.

6. Appellants' attorneys represent that they are authorized by each of the respective appellants to enter into the foregoing stipulation.

Dated: New York, N. Y., May 1, 1963.

Greenfield Rothstein Klein & Bellin, By Sidney W. Rothstein, a member of the firm, Attorneys for Appellants.

Amen, Weisman & Butler, By Herbert F. Roth, a member of the firm, Attorneys for Carvel Appellees.

Shearman & Sterling, By Robert L. Clare, Jr., a member of the firm, Attorneys for Appellee H. P. Hood & Sons

Albert L. Wigor, Attorneys for Appellee Eagle Cone Corporation.

William G. Mulligan, Attorney for Appellee Rakestraw's Dairy Products, Inc.

So Ordered, May 2, 1963.

C. E. C., J. J. S., P. R. H.
U. S. C. JJ.

[File endorsement omitted]

In United States Court of Appeals
For the Second Circuit

No. 96—September Term, 1963.

Argued October 24, 1963

Docket No. 28206

Bernard Susser, et al., Plaintiffs-Appellants,

—v.—

Carvel Corporation, Carvel Dari-Freeze Stores, Inc., Carvel Stores Realty Corporation, et al., Defendants-Appellees.

And Eight Other Cases,

Southern District of New York Civil File Numbers 150-212, 152-119, 152-120, 153-193, 60 Civil 63, 153-194, 60 Civil 1096, 60 Civil 1990, and 60 Civil 2042.

Before: Lumbard, *Chief Judge*, Medina and Friendly, *Circuit Judges*.

Appeals from judgments of the United States District Court for the Southern District of New York, Archie O. Dawson, *J.*, which dismissed the plaintiffs' complaints

charging violations of the antitrust laws and fraudulent misrepresentations. 206 F. Supp. 636 (S. D. N. Y. 1963). Affirmed.

Sidney W. Rothstein, New York, N. Y. (Joseph L. Klein, Greenfield, Rothstein & Klein, New York, N. Y., on the brief), for plaintiffs-appellants Bernard Susser, et al.

Herman L. Weisman, New York, N. Y. (Herbert F. Roth, Amen, Weisman and Butler, New York, N. Y., on the brief), for defendants-appellees Carvel, et al.

William G. Mulligan, New York, N. Y., for defendant-appellee Rakestraw's Dairy Products.

John A. Wilson, New York, N. Y. (Willard M. L. Robinson, Shearman & Sterling, New York, N. Y., on the brief.), for defendant-appellee H. P. Hood & Sons, Inc.

Irving L. Weinburger, New York, N. Y. (Albert L. Wigor, New York, N. Y., on the brief), for defendant-appellee Eagle Cone Corporation.

OPINION—May 8, 1964

LUMBARD, *Chief Judge* (writing for the majority in part and dissenting in part):

The plaintiffs in nine actions which were tried together in the Southern District of New York appeal from the dismissal of their complaints which alleged violations of the antitrust laws and sought treble damages from the Carvel Corporation, a New York corporation which manufactures dairy and primarily soft ice cream products, its subsidiary organizations, certain of its individual officers and attorneys, and a number of its suppliers. The plaintiffs, former and present individual operators of Carvel franchise outlets in Massachusetts, Connecticut and Pennsylvania, also charged the Carvel defendants with fraudulent misrepresentations in the franchise negotiations.

After a separate trial of the fraud charges Judge Dawson, sitting without a jury, dismissed the complaints as to these charges on February 7, 1962. The issue of liability on the antitrust causes of action was tried separately before Judge Dawson without a jury. The plaintiffs alleged that Carvel had unlawfully fixed the prices of the retail products sold at the franchise stores and that the franchise agreements embodied tying and exclusive dealing arrangements violative of the Sherman and Clayton acts. The complaints also charged that the contracts between Carvel and the supplier defendants embodied concerted refusals to deal with the plaintiffs violative of the antitrust laws. In a pre-trial order the plaintiffs stipulated that they would rely solely upon "per se" violations of the antitrust laws as shown in certain written agreements and other documents. From a judgment which, with one exception,[1] dismissed the complaints against all the defendants on the ground that the plaintiffs had failed to prove violations of the antitrust laws, 206 F. Supp. 636 (S. D. N. Y. 1963), the plaintiffs appeal.

The Carvel Franchise System

Although the franchise operators conduct their stores as independent businessmen, through provisions in the franchise agreement Carvel is able to maintain a chain of 400 stores uniform in appearance as well as in operation. The dealer is obligated to conduct his business in accordance with a Standard Operating Procedure Manual (Manual) which governs in great detail the general operation of the store, including the types of products which may be offered for sale, the recipes for their preparation, the nature and placement of advertising displays in the store, the color of the employees' uniforms, and the hours when the store lights must be turned on. The stores are identical in design, each featuring the Carvel crown and cone trademark on a flat slanting roof, glass walls at its front, and the name "Carvel" on its side in neon lights. This distinctive

[1] Judge Dawson held invalid the pricing provisions of the pre-1955 franchise agreement.

design is protected by a design patent. The ice cream, which is processed from a mix prepared from a secret formula, is dispensed from a patented machine which bears the Carvel name or trademark. The paper containers, ice cream cones, and spoons all bear the Carvel name and in some instances are unique in design.

The Carvel chain of franchise stores has grown from approximately 180 in 1954 to approximately 400 at the time of trial in 1962. The stores are presently located throughout the eastern portion of the United States from Maine to Florida and as far west as Wisconsin. Their annual gross sales are from six to eight million dollars. Carvel's sales to the stores of supplies, equipment, and machinery reached a high point of $5,532,396 in 1957 and in 1960 totalled $4,460,689.

Special counsel retained by Carvel in 1955 for that purpose drafted a new form of the franchise agreement. The plaintiffs in four of the actions entered into franchise agreements prior to 1955; the plaintiffs in the remaining actions became franchisees after 1955. Both agreements and the corresponding Manuals must therefore be scrutinized. The new agreement effected two important changes. First, whereas under the earlier agreement the franchise dealer was obligated to sell Carvel products at prices fixed by the parent organization, the new agreement explicitly provides that the dealer has the right to fix his own prices. Second, under the earlier agreement the dealer was obliged to purchase his entire requirements of supplies, machinery, equipment, and paper goods from Carvel or Carvel approved sources. The new agreement requires the purchase from Carvel or Carvel approved sources only of those supplies which are a part of the end product sold to the public and permits the dealer to purchase machinery, equipment, and paper goods from independent sources so long as his store is maintained in accordance with the Manual specifications.

Price-Fixing

It is undisputed that the pre-1955 Manual established "standard selling prices" to which the dealers were obligated to adhere. The pre-1955 franchise required the deal-

ers "To maintain prices on products designated in, and as per Carvel Standard Operating Procedure and not to conduct any reduced price sales of these items without written consent from Carvel." Judge Dawson held that these price-fixing provisions were illegal and that the four plaintiffs who had entered into the earlier franchise were entitled to a trial on the issue of damages. No appeal was taken from this aspect of the judgment below.[2]

The revised franchise provides: "The dealer shall have the right to sell Carvel's Frozen Dairy Product and/or other items authorized for sale by him under the terms of this agreement at any price that the dealer determines. Wherever Carvel recommends a retail price, such recommendation is based upon Carvel's experience concerning all factors that enter into a proper price, but such recommendation is in no manner binding upon the dealer." The appellants contend that notwithstanding this provision Carvel effectively continued to fix prices at which Carvel products were sold to the public and that Judge Dawson's finding to the contrary is clearly erroneous.

Even in the absence of express contractual provisions which evidence an unlawful scheme, a charge of unlawful price-fixing may be substantiated by proof of a course of conduct by which the seller or licensor effectively maintains control of the ultimate retail price at which a product is sold. *Federal Trade Commission* v. *Beech-Nut Packing Co.*, 257 U. S. 441 (1922). The appellants direct our attention to the fact that six pages of the revised Manual continued to refer to "Standard selling price"; that in letters to several dealers Carvel emphasized that only 10¢ and 20¢ cones were prescribed by the Manual and that the minimum portions prescribed by the Manual were mandatory; that Carvel sought to have dealers report to it any deviation by other dealers from the requirements of the Manual; and that Carvel suggested that dealers seek its permission before conducting a sale at prices other than those established

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[2] In accordance with Rule 54(b) of the Federal Rules of Civil Procedure Judge Dawson, finding no good reason for delay, directed the entry of judgments in all the actions, although damages were yet to be ascertained in four of the cases.

in the Manual. Moreover, the appellants emphasize the existence of a board of governors consisting of various dealers appointed by Carvel, the function of which is to make recommendations concerning the suggested retail selling price of Carvel products.

As Judge Dawson noted, the mere existence of a means whereby retail price levels are recommended is not sufficient to establish a violation of the Sherman Act, unless there is a showing of an attempt to enforce a price structure upon the retail tradesmen. *See Maple Flooring Mfrs. Ass'n* v. *United States*, 268 U. S. 563 (1925); *Cement Mfrs. Protective Ass'n* v. *United States*, 268 U. S. 588 (1925). Here, the franchise provisions explicitly reserved to the individual dealer the right to set whatever price he desired. And, by contrast with the letters to which the appellants referred, Carvel introduced in evidence bulletins circulated to all the dealers as well as letters sent to several emphasizing that Carvel had changed its prior pricing policy and that each dealer now had the right to set his own prices, although Carvel did indicate that its suggested retail prices were based upon its own broad experience in customer sales.

Fred Vettel, Carvel's general manager since 1955, testified that the board of governors operated primarily as a medium for the interchange of ideas among a representative group of individual franchise dealers. He further stated that since some time in 1957 Carvel had made available to the dealers advertising displays which left blank spaces for those dealers who wished to insert prices other than those suggested by the Carvel organization, although the appellants adduced evidence that on some occasions requests for such posters were refused.

In short, the evidence was contradictory on the question whether Carvel attempted to impose a binding price structure on the retail dealers. It is not the duty of this court to consider *de novo* the conflicting evidence and resolve this factual issue; rather, we must review the determination of the district court to determine whether or not it is clearly erroneous. See *Ruby* v. *American Airlines, Inc.*, 2d Cir., Docket No. 28473, February 14, 1964, pp. 998-1002; *United States* v. *National Ass'n of Real Estate Boards*, 339 U. S.

485, 494-96 (1950). There is much evidence to support Judge Dawson's finding of fact that Carvel did not engage in an unlawful price-fixing scheme, and we cannot say that Judge Dawson's conclusion was clearly erroneous.[3]

EXCLUSIVE DEALING AND TYING ARRANGEMENTS

The appellants maintain that the franchise agreements embody violations of the Sherman[4] and Clayton[5] acts inso-

[3] We thus need not decide whether the products allegedly the subjects of unlawful price-fixing were sufficiently a part of interstate commerce to sustain a charge of Sherman Act violation.

[4] Section 1 of the Sherman Act, 15 U. S. C. §1, provides:

"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal . . ."

Section 2, 15 U. S. C. §2, provides:

"Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

[5] Section 3 of the Clayton Act, 15 U. S. C. §14, provides:

"It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease, or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities, whether patented or unpatented, for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia, or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies, or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce."

far as they require the dealer to refrain from selling any non-Carvel product and insofar as they obligate the dealer to purchase directly from Carvel or from a source approved by Carvel his supply not only of the basic Carvel ice cream mix, prepared under a secret formula, but also certain other products used in either the preparation or sale of the end product offered to the public. The requirement that the dealer sell solely Carvel products would, if taken alone, present an example of an exclusive dealing arrangement; the requirement that the dealer purchase not only Carvel mix but also certain other products would, if taken alone, present an example of a tying arrangement. Inasmuch as the Supreme Court has erected a much more stringent test of legality with which to measure tying arrangements than that which is applied to exclusive dealerships, we consider first the appropriate standard to be applied where both provisions are embodied in a single contractual relationship.

We can find no justification for treating the tying aspects of an agreement which embodies exclusive dealing aspects as well any differently than we would treat a tying arrangement alone. The fundamental economic evil in a tying arrangement deemed unlawful under the antitrust laws lies in the ability of a producer who possesses market dominance in one particular product to impose upon his vendee the obligation to purchase other products as to which the producer possesses no market dominance and the consequent foreclosure to other producers of the non-dominant products of such markets for their merchandise. Certainly the economic impact of such an arrangement is in no respect diluted by inclusion of provisions which restrict the vendee solely to the use or sale of the producer's products. We shall therefore measure the tying aspects of the Carvel franchise by the more stringent standard of legality established by the Supreme Court and the exclusive dealing aspects by the more liberal standard.

As noted above, the pre-1955 franchise obligated the dealer to "purchase and use only standard Carvel approved printed paper goods, napkins, cones, extracts, spoons, and all other Carvel products at standard market prices." The

post-1955 franchise requires the dealer to purchase from Carvel or approved sources his entire requirements of all items sold as a part of the retail product but permits the dealer to purchase machinery, equipment, and paper goods from sources other than Carvel so long as the operation is maintained in accordance with the Manual specifications.[5a]

The Tying Arrangements

Tying arrangements have been given short shrift under the antitrust laws. *International Business Machine Corp.* v. *United States,* 298 U. S. 131 (1936); *International Salt Co.* v. *United States,* 332 U. S. 392 (1947); *Times-Picayune Publishing Co.* v. *United States,* 345 U. S. 594 (1953); *Northern Pacific Railway Co.* v. *United States,* 356 U. S. 1 (1958); *United States* v. *Loew's, Inc.,* 371 U. S. 38 (1962). See generally Turner, The Validity of Tying Arrangements Under the Antitrust Laws, 72 Harv. L. Rev. 50 (1958). Yet it seems clear that in compelling circumstances the protection of goodwill, as embodied for example in a valuable trademark, may justify an otherwise invalid tying arrangement. But "[t]he only situation, indeed, in which the protection of good will may necessitate the use of tying clauses is where specifications for a substitute [for the tied product] would be so detailed that they could not practicably be supplied." *Standard Oil Co.* v. *United States,* 337 U. S. 293, 306 (1949). The threshold question is thus whether the Carvel franchise embodies a tying arrangement and, if so, whether that arrangement can be justified as necessary for the protection of Carvel's goodwill.

A tying arrangement may be defined as an agreement under which the vendor will sell one product only if the purchaser agrees to buy another independent product as well. Two types of economic injury characteristically arise from such an arrangement: first, foreclosure to the vendee

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[5a] The post-1955 agreement provides that "[i]n the event that the Dealer desires to purchase his printed goods from sources other than Carvel, Carvel shall license manufacturers of such products to print the Carvel name thereon in connection with sales to the Dealer, with products made in accordance with Carvel standards."

of alternate sources of supply for the second, or tied, product; and second, foreclosure of possible market outlets to other competing suppliers of the tied product. The source of this injury—and the fundamental element which requires that such arrangements be deemed illegal—lies in the vendor's "sufficient economic power with respect to the tying product to appreciably restrain free competition in the market for the tied product." *Northern Pacific Railway Co.* v. *United States, supra,* at p. 6. Such power may be found either in the vendor's dominance of the market in the tying product or in its uniqueness or particular appeal to the consumer. *United States* v. *Loew's, Inc., supra,* at p. 45.

My brothers would affirm the judgment of the district court in all respects. With regard to the allegations of unlawful tying arrangements, they reason that the plaintiffs limited themselves by pre-trial stipulation to reliance solely on "per se" violations of the antitrust laws and since they failed to establish Carvel's market dominance and that a substantial amount of commerce is affected they have failed as well to make out a *per se* violation of the antitrust laws. I cannot agree.

The stipulation, in relevant part, states only that the plaintiffs will rely on *per se* violations and that their proofs will be limited to the written franchise agreements, other documents supplementary thereto, and the testimony of two individuals taken prior to trial, one of whom was Fred Vettel, Carvel's general manager. The effect of this stipulation seems clear to me. The plaintiffs agreed that they would go no further than the documentary evidence alluded to in attempting to make out their claims of antitrust violation. The only question is whether the plaintiffs in fact introduced sufficient evidence to make out an antitrust violation by the Carvel defendants. I think they did. The nature of their stipulation and the label they gave it is wholly immaterial to that question. I cannot see what can possibly turn on the fact that the plaintiffs limited themselves to what the stipulation termed "per se violations."

The court's focus must be entirely on the state of the record. The crucial question is whether the record satisfies the requirements of proof of an antitrust violation. Each element of a tying arrangement must be considered in turn.

Does Carvel possess the requisite economic leverage? Despite the absence in the record of substantial economic data, in the light of the Supreme Court's decision in *United States* v. *Loew's, Inc., supra,* I believe that such power may be presumed from the use of the Carvel trademark as the principal feature of the Carvel franchise system. In *Loew's,* the Court declared that "when the tying product is patented or copyrighted . . . sufficiency of economic power is presumed." 371 U. S. at 45 n. 4. I can find little reason to distinguish, in determining the legality of an allegedly unlawful tying arrangement, between the economic power generated by a patent or copyright on the one hand and that generated by a trademark on the other. In all three cases, the Congress has granted a statutory monopoly which places in the hands of the owner the right, within the limitations of federal law, to do as he will with the protected product. The value of the patent, copyright or trademark is, of course, directly proportionate to the consumer desirability of the protected product.

I can find no reason not to extend this presumption of economic power to trademarks.[6] In any event, the claims which Carvel itself proffers lend added weight to the presumption, for Carvel's claim of economic justification is founded upon the substantial value of its trademark and the necessity for contractual restraints upon its dealers to protect that value. No doubt the recent growth of the Carvel chain from 180 to 400 stores has been attributable in great measure to the increasing value of the Carvel trademark in terms of consumer appeal and the concomitant increase in economic power generated by that trademark. The essential element in the Carvel franchise is the trademark license agreement which permits the dealer to display, label and sell its retail products as "Carvel" products.

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[6] The protection given to trademarks is in some respects even more extensive than that given either patents or copyrights. The duration of a trademark, for example, may, during continued use, be extended beyond 20 years without limit of time, 15 U. S. C. §§1058-59, whereas a patent expires after 17 years, 35 U. S. C. §154, and a copyright after 28 years, subject to a renewal period of 28 years, 17 U. S. C. §24.

To reinforce its basic trademark Carvel also possesses some nine design patents covering its building structure, advertising displays, freezers and other apparatus, three patents covering machinery and some twenty trademarks in varying forms for use with the wide variety of products which are merchandised at the franchise stores.[6a] It is the lease or license of the trademark itself, buttressed by this array of patents and subsidiary trademarks, to which are tied the other products.

Having concluded that the Carvel trademark presumptively generates sufficient economic power, we must consider two arguments advanced to support the proposition that the Carvel franchise in any event does not embody an unlawful tying arrangement within the provisions of the Clayton Act. First, it is contended that section 3 of that act condemns only agreements which obligate the purchaser not to "use or deal in the goods . . . of a competitor or competitors of the lessor or seller," and that since Carvel does not compete with suppliers of cones, toppings, extracts, ice cream mix and so forth there has been no improper foreclosure of competition. Generally, Carvel's suppliers accept orders directly from the dealers, bill the dealers and deliver directly to them rather than to Carvel. However, the transaction is cast in the form of a sale directly to Carvel which in turn resells the items to the individual dealers, the suppliers acting as Carvel's agents for payment and delivery. Carvel sets the prices at which these items are sold to the dealers. From the point of view of the legal form adopted, then, it is clear that Carvel does compete with other suppliers of these products. Moreover, there is little difference in economic impact between Carvel's purchasing and reselling these supplies and Carvel's production of these items in the first instance.

[6a] Exhibit C-2, introduced by the Carvel defendants, is comprised of these 32 patents, design patents, and trademarks, including, for example, design patent #169,055, issued on March 24, 1953, covering the building structure; patent #2,731,925, issued on January 24, 1956, covering the one piece barrel end and dispenser tip; and design patent #184,983, issued April 28, 1959, covering a top unit for vending motor vehicles.

With regard to the foreclosure to other suppliers of the Carvel franchise stores as possible market outlets, it must be conceded that vigorous competition would probably exist among such suppliers to secure the initial contract with the Carvel organization. Nevertheless, the nature of this competition must be substantially different from that which would otherwise prevail. In view of the leverage which the Carvel corporation wields in supervising the supplying of some 400 retail outlets, competition will most likely take the form of substantial price concessions and the concomitant inability of smaller suppliers effectively to compete with larger producers who are capable of meeting Carvel's price and service demands.

Of equal significance is the economic impact of the prevailing arrangement in terms of foreclosure to the individual franchise stores of the opportunity to deal with individual suppliers. While under the franchise the dealer may enjoy lower prices on some items,[7] Carvel undoubtedly reaps some economic benefit from its status as an intermediary.[8] There is no indication whether or not the dealers, either individually or in combination, could secure lower prices and better service from local producers of the same products. In short, in order to secure the benefits of employing the Carvel name on his retail products, the dealer has been forced to surrender his right to negotiate with suppliers of his own choice on matters such as price, delivery and other aspects of a contract of sale. Where such a surrender may be traced to the economic leverage of the other party, arising from its trademark, the elements of an unlawful tying arrangement have been established. Certainly the amount of commerce here involved is not insubstantial, in light of Carvel's sales to the franchise dealers in 1960 alone of $3,965,923 in ingredients and other supplies.

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[7] For example, the evidence indicated that an ice cream cone similar to that for which the dealers paid $4.80 per 600 to Carvel was listed on Eagle Cone Corporation's wholesale price list at $5.60 per 600, in lots of 25 cases or more.

[8] For example, the evidence indicated that Carvel charged the dealers $10.00 per thousand for ice cream cones which it purchased for $9.50 from the cone manufacturer.

The second argument advanced in support of the proposition that the Carvel franchise does not embody a tying arrangement is that we are dealing not with a series of individual products tied together for purposes of sale, but rather with one unified product, that is the Carvel product which is ultimately consumed by the public. I do not agree. Carvel sells supplies as distinct items in large quantities—for example, ten gallons of mix, ten gallons of chocolate syrup, and so forth. Carvel itself purchases these supplies as distinct items from a wide variety of suppliers who in turn make individual deliveries to the franchise outlets. By their very nature it seems clear that there is no reason to treat these separate products as one unified product although to the ultimate consumer of an ice cream cone or a sundae they would seem to be one.

The plaintiffs having proved the essentials of a tying arrangement proscribed by the Clayton Act, the burden fell upon Carvel to justify the arrangement as reasonably necessary to protect its trademark. While it is clear that some quality control is essential for the protection of Carvel's goodwill—if not required by law for a proper trademark licensing agreement, see *E. I. du Pont de Nemours & Co.* v. *Celanese Corp. of America,* 167 F. 2d 484 (Ct. of Cust. and Pat. App. 1948); *Arthur Murray, Inc.* v. *Horst,* 110 F. Supp. 678 (D. Mass. 1953); *Morse-Starrett Prod. Co.* v. *Steccone,* 86 F. Supp. 796 (N. D. Calif. 1949)—the justification for this control requires proof that the specifications for products to substitute for those offered by Carvel would be so complex and detailed as to make it impracticable for Carvel to establish such specifications. See *Standard Oil Co.* v. *United States, supra,* at 306.

I find the record with respect to justification of Carvel's control to be unsatisfactory and inconclusive. The evidence before Judge Dawson was for the most part documentary. With the exception of the self-serving statement in the franchise agreement that the dealer's obligation to purchase only from Carvel those items which are part of the end product is necessary "[i]n order to safeguard the integrity of Carvel's trade-marks," the documents are of

little value on the issue of trademark justification. Vettel, Carvel's general manager, testified that the various toppings and other garnishments are made by the suppliers to Carvel's specifications, although not under a secret formula as is the basic ice cream mix. Vettel stated that it would be "impossible" to police the individual stores; yet he conceded, as did a representative of H. P. Hood & Sons, a supplier to Carvel of ice cream mix, that the toppings and garnishments sold by Carvel to the dealers could be purchased elsewhere on the market.

In light of this sparse showing, I am unable to find sufficient support for Judge Dawson's conclusion that the tying arrangement was justified by the necessity for Carvel to establish quality controls to protect its trademark. My brothers suggest the difficulty of "controlling something so insusceptible of precise verbalization as the desired texture and taste of an ice cream cone or sundae." Yet, since Carvel itself manufactures none of the ingredients sold to the dealers, it has itself apparently surmounted the difficulty of verbalizing the recipes for the proper preparation of its ingredients. It is especially noteworthy that in *Engbrecht* v. *Dairy Queen Co.*, 203 F. Supp. 714 (D. Kans. 1962), it was established that Dairy Queen, which operates a nationwide chain of some 3,400 soft ice cream franchise stores quite similar to Carvel's, does not require that its dealers purchase mix, toppings, or other garnishments directly from it or from approved sources, but instead it establishes specifications to govern such items and enforces these by means of periodic inspection of its franchise stores. This fact is by no means conclusive of the ability of Carvel, a somewhat smaller chain, to maintain its own standards of quality through similar controls, since the circumstances may differ, but it negates the proposition that it is logical and reasonable to infer—in the absence of proof more compelling than the mere self-serving statement of Carvel's own general manager—that it was reasonable and necessary for Carvel to embody a tying arrangement into its franchise agreement. Dairy Queen poses in striking contrast the insufficiency of the evidence adduced by Carvel to support its claim.

The antitrust aspects of the plaintiffs' claims were tried more or less as the aftermath of the far more lengthy fraud and deceit aspects of the case. Apparently because of all the time already spent in litigating the other issues, counsel were urged by the district court to limit their proofs in the antitrust phase of the case essentially to documentary evidence, and this may explain as well the plaintiffs' reliance solely on "per se" violations of the antitrust laws. With the case in this posture, I would think it best to remand the cause to the district court for a further hearing limited to the issue of justification. If Carvel could establish its claim the result ultimately would be the same. If Carvel were unable to do so the plaintiffs would have sufficiently established all the elements of an unlawful tying arrangement.

The Exclusive Dealing Arrangements

As we have noted, our application of the stricter standard of legality established by the Supreme Court to the tying aspects of the Carvel franchise does not preclude us from applying the more flexible standard established by the Court for exclusive dealing arrangements to the requirement in the franchise that the dealer sell at retail only Carvel or Carvel approved products. The plaintiffs maintain that this provision erects an unlawful exclusive dealership violative of the antitrust laws. We do not agree.

In *Tampa Electric Co.* v. *Nashville Co.*, 365 U. S. 320 (1961), the Supreme Court held valid a contract between Tampa, a public utility, and Nashville, a medium sized coal company, which obligated Nashville to supply Tampa's entire requirements of coal over a twenty-year period—one form of an exclusive dealing arrangement. After discussing the necessity of delineating the relevant line of commerce and the geographical market, the Court noted that requirements contracts "have not been declared illegal *per se*" and stated that in determining whether or not the contract in issue would substantially lessen competition the courts must take into account "the relative strength of the parties, the proportionate volume of commerce involved in relation to the total volume of commerce in the relevant

market area, and the probable of immediate and future effects which pre-emption of that share of the market might have on effective competition therein." 365 U. S. at 329. The Court further emphasized the significance of the possible economic justification for the accused arrangement, in light of the legitimate reasons for employing such a device.

Lacking economic data sufficient to meet the standard thus established in *Tampa Electric*, the appellants here urge that the Supreme Court's decision in *Standard Oil Co.* v. *United States, supra,* is controlling and that they need prove only that "competition has been foreclosed in a substantial share of the line of commerce affected." 337 U. S. at 314. We need not comment on whether the appellants could sustain their allegations under the doctrine enunciated in *Standard Oil,* for it seems indisputable that in *Tampa Electric* the Court deviated from the more rigorous and inflexible rule it had established in *Standard Oil* and erected criteria which demand close scrutiny of the economic ramifications of an exclusive dealing arrangement in order to determine the probable anti-competitive effects of such a device. See Bok, The Tampa Electric Case and the Problem of Exclusive Arrangements Under the Clayton Act, 1961 Sup. Ct. Rev. 267, 281-85. We find it plain that the appellants have failed to bear this burden. Instead of introducing evidence to establish the economic effects of the Carvel franchise structure, they merely protest that anti-competitive effects may be inferred solely from the existence of such a network of exclusive dealerships. But the whole tenor of *Tampa Electric* does not permit adherence to such a stringent standard of legality.

In any event, we need not rely solely upon the appellants' failure to adduce concrete evidence concerning the relevant line of commerce and geographical market and the probable anticompetitive effects of the Carvel arrangement. For in terms of at least one factor which the Supreme Court deemed significant in *Tampa Electric*—that of economic justification—the Carvel exclusive dealership arrangement withstands any attack on its legality.

As Judge Dawson found, "the cornerstone of a franchise system must be the trademark or trade name of a product."

The fundamental device in the Carvel franchise agreement itself is the licensing to the individual dealer of the right to employ the Carvel name in his advertising displays, on the products he sells, and on the store itself. The stores are uniform in design as well as in the public display of the ice cream machinery employed, the placement of advertising displays, and the products offered for sale. The requirement that only Carvel products be sold at Carvel outlets derives from the desirability that the public identify each Carvel outlet as one of a chain which offers identical products at a uniform standard of quality. The antitrust laws certainly do not require that the licensor of a trademark permit his licensees to associate with that trademark other products unrelated to those customarily sold under the mark. It is in the public interest that products sold under one particular trademark should be subject to the control of the trademark owner. See *E. I. du Pont de Nemours & Co.* v. *Celanese Corp. of America, supra; Arthur Murray, Inc.* v. *Horst, supra; Morse-Starrett Prod. Co.* v. *Steccone, supra.* Carvel was not required to accede to the requests of one or another of the dealers that they be permitted to sell Christmas trees or hamburgers, for example, which would have thrust upon Carvel the obligation to acquaint itself with the production and sale of these items so as to establish reasonable quality controls.

Nor do the antitrust laws proscribe a trademark owner from establishing a chain of outlets uniform in appearance and operation. Trademark licensing agreements requiring the sole use of the trademarked item have withstood attack under the antitrust laws where deemed reasonably necessary to protect the goodwill interest of the trademark owner, see *Denison Mattress Factory* v. *The Spring-Air Co.*, 308 F. 2d 403 (5 Cir. 1962); *Pick Mfg. Co.* v. *General Motors Corp.*, 80 F. 2d 641 (7 Cir. 1935), and such agreements certainly are not unlawful *per se* under the antitrust laws. *Bascom Launder Corp.* v. *Telecoin Corp.*, 204 F. 2d 331 (2 Cir. 1953). Judge Dawson was fully warranted in concluding that in the context of the entire Carvel franchise system the requirement that no non-Carvel products be sold at the retail level is reasonably necessary for the protection of Carvel's goodwill.

THE SUPPLIER CONTRACTS

The appellants maintain that the agreements between Carvel and its various suppliers of ice cream mix, cones, and paper products are violative of the antitrust laws insofar as they obligate the suppliers not to deal directly with the individual dealers but solely with Carvel and not to sell to the dealers any merchandise other than that approved by Carvel. We disagree.

With regard to Carvel's contracts with Hood and Rakestraw, which produced Carvel ice cream mix in accordance with a secret formula which they pledged not to divulge, it seems perfectly clear that as the possessor of a secret formula for its ice cream mix Carvel enjoyed the right to sell it to whomever it chose, and this right was not diluted by its agreement with Hood and Rakestraw to produce the mix. Carvel was free to insist that Hood and Rakestraw produce the mix solely for Carvel and subject to Carvel's wishes as to its disposition.

As for the provision in the contracts between Carvel and Hood, Rakestraw, Eagle, a cone manufacturer, and Mohawk, a manufacturer of paper products, that the suppliers would not sell non-Carvel products to the individual dealers, we find no merit in the plaintiffs' claims. Carvel cannot be considered in competition with these suppliers from whom it purchases Carvel supplies, and such an agreement not to deal, even if established, when effected by non-competing enterprises is not illegal. See, e.g., *Packard Motor Car Co.* v. *Webster Motor Car Co.*, 243 F. 2d 418 (D. C. Cir.), cert. denied, 355 U. S. 822 (1957). Moreover, the plaintiffs failed to prove that they were foreclosed from alternate sources of supply or indeed that the supplier defendants themselves had been requested to make sales to the dealers and had refused.

Accordingly, the judgments of the district court are affirmed.

FRIENDLY, *Circuit Judge*, with whom MEDINA, *Circuit Judge*, joins:

Concurring with most of Chief Judge Lumbard's opinion, Judge Medina and I do not consider that a remand as

to the claim with respect to the "tied" purchases of flavoring, toppings and cones is either required or warranted in the light of the pre-trial order to which plaintiffs agreed. The relevant portion of this order is as follows:

> "4. That plaintiffs agree that they are relying solely upon alleged *per se* violations of the antitrust laws and make no claim other than that their evidence will establish *per se* violations of the antitrust laws.
>
> "5. Plaintiffs' evidence at the trial on the issue of liability will be limited to (a) written agreements entered into between the Carvel defendants and the plaintiffs, and other documents supplementary thereto or explanatory thereof, (b) written agreements between the Carvel defendants and the supplier defendants, and other documents supplementary thereto and explanatory thereof, and (c) testimony heretofore taken of a Mr. Vettel and a Mr. Bittner."

It could hardly be plainer that plaintiffs were confining themselves to claims of violation of the antitrust laws which, as they thought, could be sustained without other market data than the meagre amount contained in the documents offered.

In agreeing to the pre-trial order, plaintiffs may have been relying on the inclusion of tying arrangements in the list of *per se* violations in *Northern Pacific Ry.* v. *United States,* 356 U. S. 1, 5 (1958). But, as that opinion makes clear, not every tying arrangement is illegal *per se.* Tying arrangements "are unreasonable in and of themselves whenever a party has sufficient economic power with respect to the tying product to appreciably restrain free competition in the market for the tied product and a 'not insubstantial' amount of commerce is affected." 356 U. S. at 6. See also *Times-Picayune Publishing Co.* v. *United States,* 345 U. S. 594, 608-09 (1953). More recently the Court has said that tying arrangements "may fall" in the category of *per se* violations, "though not necessarily so." *White Motor Co.* v. *United States,* 372 U. S. 253, 262 (1963).

Here the facts to which plaintiffs were limited by the pre-trial order showed neither that Carvel had "sufficient economic power with respect to the tying product to ap-

preciably restrain free competition in the market for the tied product" nor that "a not insubstantial amount of commerce is affected." Indeed, such figures as exist would prove the contrary. In 1960 there were in New York, Connecticut and Massachusetts, 250 Carvel dealers out of a total of 125,000 outlets where ice cream cones could be purchased—amounting to one-fifth of one per cent of the outlets and apparently doing about one per cent of the business.[1] The other large Carvel states are New Jersey and Pennsylvania; the balance of a 1960 total of 400 Carvel dealers were scattered at one time over as many as 8 or 9 states from Maine to Florida and as far west as Wisconsin. These dealers competed not only with similar chains—Dairy Queen, Tastee Freez, Dari-Delite, King Kone, Dari-Isle, and others, with chains and independents utilizing mobile units, with chain stores and operations such as Howard Johnson, and with the ubiquitous corner drug-store. Although Carvel's aggregate sales are "not insubstantial," the totals shed no light on the amount of the "tied" sales here complained of, which common sense tells us must be a minor part.[2] The figures in footnotes 1 and 2 give some indication of the "insubstantiality" of the commerce affected even under the rather narrow test indicated by dictum in *Brown Shoe Co.* v. *United States*, 370 U. S. 294, 330 (1962), especially with reference to the cones, whose tie-in was hardest to justify in terms of quality control. Not only was the amount of commerce in these not consequential, but any damage to the plaintiffs was even less so. Eagle Cone's billings to Carvel averaged $460 per dealer per year, and Carvel's mark-up was slightly over 5% or about $25 per

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[1] The Carvel sales of Eagle Cone, which supplies all the cones for Massachusetts, Connecticut and New York, averaged $115,000 per year—about 1% of the total sales of cones in the three states.

[2] There are figures which indicate that 1960 sales of all "ingredients" other than mix to all dealers amounted to $1,354,599—or an average of less than $3,400 per dealer per year; the record does not make it clear whether all these "ingredients" were tied. Two-thirds of the figure of $3,965,923 in Chief Judge Lumbard's opinion constitute sales of the Carvel secret formula mix which surely could legally be tied to the Carvel trade-mark if that mark was to retain its significance, as he concedes.

dealer;[3] whether the dealers suffered even that much damage is questionable since the price Carvel charged them was less than they could have obtained if they bought in smaller quantities than Carvel, see fn. 7 to Chief Judge Lumbard's opinion. And, of course, it remained open to competing suppliers to bid for the Carvel business by soliciting that company—in itself an important contrast with cases where the tied item is produced by the seller.

Our brother Lumbard thinks the first of the deficiencies in proof as to economic power was remedied by Carvel's license of a package of trade-marks, design patents relating to the shape of the building etc., and a patented freezing and dispensing machine. We cannot agree. In the first place, the patented items cannot realistically be considered the "tying product" or the focus of the arrangement. Whatever has been said about the evils of "ties" to patented or copyrighted items is meaningful only in the situation where the desirability of the patented item is what motivates the purchaser to make further commitments or to give up some liberty of choice as to other products. See, e.g., *United States* v. *Loew's Inc.*, 371 U. S. 38, 45 (1962). In this case, the patented items appear to have been virtually without motivating significance in bringing about the agreement. The true tying item was rather the Carvel trade-mark, whose growing repute was intended to help the little band of Carvel dealers swim a bit faster than their numerous rivals up the highly competitive stream. There may, of course, be cases where a trade-mark has acquired such prominence that the coupling of some further item to its license would constitute *per se* violation; but such a trade-[redacted] would satisfy the market dominance test of *Times-Picayune* and *Northern Pacific*. The figures show that Carvel is not such a mark.

Tying arrangements differ from other *per se* violations, such as price-fixing, *United States* v. *Trenton Potteries Co.*, 273 U. S. 392 (1927), in that they can be justified on occasion, as by proof that "the protection of goodwill may

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[3] There was evidence that one of the plaintiffs had purchased $621 worth of cones in the big year, 1959; Carvel's mark-up on these would have been around $30.

necessitate" their use "where specifications for a substitute would be so detailed that they could not practicably be supplied," *Standard Oil Co. of Calif.* v. *United States*, 337 U. S. 293, 306 (1949). Since the value of a trade-mark depends solely on the public image it conveys, its holder must exercise controls to assure himself that the mark is not shown in a derogatory light. The record affords no sufficient basis for upsetting the finding of the District Judge that "To require Carvel to limit itself to advance specifications of standards for all the various types of accessory products used in connection with the mix would impose an impractical and unreasonable burden of formulation . . . " Although instances of impossibility of control through specification may indeed be rare in cases involving the proper functioning of mechanical elements of a machine, see *International Business Machines Corp.* v. *United States*, 298 U. S. 131, 139 (1936); *International Salt Co.* v. *United States*, 332 U. S. 392, 397-98 (1947); Turner, The Validity of Tying Arrangements under the Antitrust Laws, 72 Harv. L. Rev. 50 (1958); but see *Dehydrating Process Co.* v. *A. O. Smith Corp.*, 292 F. 2d 653 (1 Cir.), cert. denied, 368 U. S. 931 (1961); *United States* v. *Jerrold Electronics Corp.*, 187 F. Supp. 545 (E. D. Pa. 1960), aff'd *per curiam*, 365 U. S. 567 (1961), such cases are scarcely relevant to the problem of controlling something so insusceptible of precise verbalization as the desired texture and taste of an ice cream cone or sundae; that Carvel was able to specify this to its source of supply, whose product it regularly checked, does not show that administration could be confided to 400 dealers. Furthermore in most states Carvel would risk liability to anyone injured by a foreign substance in the frozen mix, see ALI, Restatement (Second), Torts 402A (Tent. Draft No. 7, 1962); although it might not be so with respect to ingredients purchased from suppliers of the dealer's own choosing, the difficulties of proof are such that it is entitled to insist on products in which it has complete confidence. Vettel's testimony that the success of the enterprise required distinctive flavorings of uniform quality and that he considered it impracticable to handle the problem by specification and policing was sufficiently reasonable and persuasive that the judge was en-

titled to credit it, whether or not one of us would agree.[4] We see little force in the fact that a competitor, which licenses only freezing machines and the trade-mark and does not sell a mix made by a secret formula, is satisfied with less exacting provisions. See *Engbrecht* v. *Dairy Queen Co.*, 203 F. Supp. 714 (D. Kans. 1962). Moreover, as Vettel also explained, by packing the flavoring in tins or bags that contain exactly the amount required for a 10-gallon can of mix, Carvel encouraged the dealers to use an adequate quantity and provided an automatic control. Finally there is a limit to the amount of inspecting feasible when each dealer purchases an average of less than $12,000 a year of Carvel products (including equipment) and sells in 10¢ and 20¢ units.

Even were we to consider the patented machines and design patents to be a relevant part of the tying arrangement, the *Northern Pacific* opinion ruled out the idea, thought by some to have been implicit in earlier opinions, that proof of the license of a patented device sufficed *semper et ubique* to show the market dominance required to render a tying arrangement a *per se* violation.[5] In doing so it appropriately recognized the facts of business life. The society of patents is not egalitarian. As had been well said three years earlier, although with some dissent, in the Report of the Attorney General's Committee to Study the Antitrust Laws (1955), 238:

> "The patent may be broad and basic, in which event the economic power incident to the patent makes the tying clause illegal. On the other hand, the patent may be narrow and unimportant, in which event it may confer virtually no real market power. Accord-

[4] Vettel testified that one of the specifications to the manufacturer was that certain fruits be purchased at crop site; we are at a loss to understand how this could be policed by inspection on the dealer's premises.

[5] "In arriving at its decision in International Salt the Court placed no reliance on the fact that a patent was involved nor did it give the slightest intimation that the outcome would have been any different if that had not been the case. If anything, the Court held the challenged tying arrangements unlawful *despite* the fact that the tying item was patented, not because of it." 356 U. S. at 9.

> ingly, where the tying product is patented, the patentee should be permitted to show that in the entire factual setting, including the scope of the patent in relation to other patented or unpatented products, the patent does not create the market power requisite to illegality of the tying clause."

Indeed, the statement in *Northern Pacific* had been anticipated by the remark in *Standard Oil Co. of Calif.* v. *United States, supra,* at 307, that a patent is "*prima facie* evidence" of market control—evidence which was clearly rebutted here. Although there is language in *United States* v. *Loew's Inc., supra,* at 44-48 which lends support to a theory that the mere existence of a patent of any description is not merely *prima facie* but irrebutable evidence of market control, we find it hard to believe that the Court would thus have obliquely reversed the position taken in *Northern Pacific,* a position underscored by Mr. Justice Harlan's remarks in dissent, 356 U. S. at 17-19; the language rather must be read in the context of the Court's previous proscription of block-booking of motion picture films in *United States* v. *Paramount Pictures, Inc.,* 334 U. S. 131, 156-59 (1948), see 371 U. S. at 48. There is scant analogy between unique "hit" movies, or the tabulating and computing machines in *International Business Machines Corp.* v. *United States, supra,* as to which the defendant had but one smaller competitor, or the salt-processing machines in *International Salt Co.* v. *United States,* 322 U. S. 392 (1947), and Carvel's dispensing machine by which, along with the rest of its package of distinctive devices, it had gained only 1% of the ice cream cone market in the area of its heaviest concentration, see fn. 1.

The triviality of whatever financial hardships the plaintiffs may have suffered as a result of these allegedly illegal contracts explains why they were willing to limit themselves to *per se* violations rather than incur the expense of assembling market data to gain what at best would be a negligible recovery. They have had two trials, one in which they were defeated in their claim of fraud, with a transcript of nearly 4,000 pages; we see no sufficient reason to order a third.

IN UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Present: Hon. J. Edward Lumbard, Chief Judge; Hon. Harold R. Medina, Hon. Henry J. Friendly, Circuit Judges.

Civil File No. 150-212

BERNARD SUSSER, GERTRUDE SUSSER and SHIRLEY SCHWARTZ,
Plaintiffs-Appellants,

v.

CARVEL CORPORATION, et al., Defendants-Appellees.

Civil File No. 152-119

LESTER N. MODICK and HARRIET M. MODICK,
Plaintiffs-Appellants,

v.

CARVEL CORPORATION, et al., Defendants-Appellees.

Civil File No. 152-120

MARTHA M. McCOY and FRANK T. McCOY,
Plaintiffs-Appellants,

v.

CARVEL CORPORATION, et al., Defendants-Appellees.

Civil File No. 153-193

JAMES OSSOLA and ELIZABETH G. OSSOLA,
Plaintiffs-Appellants,

v.

CARVEL CORPORATION, et al., Defendants-Appellees.

Civil File No. 60 Civil 63

JAMES P. PIERCE, RITA PIERCE, LYLE FREDERICK, LEROY M. FREDERICK, ALFRED MUELLER and SOL RODENS, Plaintiffs-Appellants,

v.

CARVEL CORPORATION, et al., Defendants-Appellees.

Civil File No. 153-194

JOSEPH P. PHELAN, Plaintiff-Appellant,

v.

CARVEL CORPORATION, et al., Defendants-Appellees.

Civil File No. 60 Civil 1096

MATTHEW SEU and JANE I. SEU, Plaintiffs-Appellants,

v.

CARVEL CORPORATION, et al., Defendants-Appellees.

Civil File No. 60 Civil 1990

PAUL S. GIBERMAN and GERTRUDE GIBERMAN,
Plaintiffs-Appellants,

v.

CARVEL CORPORATION, et al., Defendants-Appellees.

Civil File No. 60 Civil 2042

JOSEPH PAZDRO and YOLANDA PAZDRO, Plaintiffs-Appellants,

v.

CARVEL CORPORATION, et al., Defendants-Appellees.

Appeal from the United States District Court for the Southern District of New York.

JUDGMENT—May 8, 1964

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the judgments of said District Court be and they hereby are affirmed with costs to the appellees Rakestraw's Dairy Products Inc., Eagle Cone Corporation and Carvel Corporation.

A. Daniel Fusaro, Clerk.

Clerk's Certificate to foregoing transcript (omitted in printing).

SUPREME COURT OF THE UNITED STATES

No. 355, October Term, 1964

[Title omitted]

ORDER ALLOWING CERTIORARI—October 26, 1964

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

SUPREME COURT U. S.

Office-Supreme Court, U.S.
FILED
AUG 6 1964
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1964

No. 355

Civil File No. 150-212

BERNARD SUSSER, GERTRUDE SUSSER and SHIRLEY SCHWARTZ, *Petitioners,*

against

CARVEL CORPORATION, CARVEL DARI-FREEZE STORES, INC., CARVEL STORES REALTY CORPORATION, EAGLE CONE CORPORATION, H. P. HOOD & SONS, *Respondents.*

Civil File No. 152-119

LESTER N. MODICK and HARRIET M. MODICK, *Petitioners,*

against

CARVEL STORES OF NEW YORK, INC., CARVEL CORPORATION, CARVEL DARI-FREEZE STORES, INC., EAGLE CONE CORPORATION, H. P. HOOD & SONS, *Respondents.*

Civil File No. 152-120

MARTHA M. McCOY and FRANK T. McCOY, *Petitioners,*

against

CARVEL CORPORATION, CARVEL DARI-FREEZE STORES, INC., CARVEL STORES REALTY CORPORATION, EAGLE CONE CORPORATION, H. P. HOOD & SONS, *Respondents.*

Civil File No. 153-193

JAMES OSSOLA and ELIZABETH G. OSSOLA, *Petitioners,*

against

CARVEL STORES OF NEW YORK, INC., CARVEL DARI-FREEZE STORES, INC., CARVEL STORES REALTY CORPORATION, EAGLE CONE CORPORATION, H. P. HOOD & SONS, *Respondents.*

Civil File No. 153-194

JOSEPH P. PHELAN, *Petitioner,*

against

CARVEL STORES OF NEW YORK, INC., CARVEL DARI-FREEZE STORES, INC., CARVEL STORES REALTY CORPORATION, EAGLE CONE CORPORATION, H. P. HOOD & SONS, *Respondents.*

(Continued on Reverse Side of Cover)

Civil File No. 60 Civil 63

JAMES P. PIERCE, RITA PIERCE, LYLE FREDERICK, LEROY M. FREDERICK, ALFRED MUELLER and SOL RODENS, *Petitioners,*

against

CARVEL STORES OF NEW YORK, INC., CARVEL DARI-FREEZE STORES, INC., CARVEL CORPORATION, CARVEL STORES OF PENNSYLVANIA, INC., CHAIN LOCATIONS OF AMERICA, INC., RAKESTRAW'S DAIRY PRODUCTS, INC., *Respondents.*

Civil File No. 60 Civil 1096

MATTHEW SEU and JANE L. SEU, *Petitioners,*

against

CARVEL CORPORATION, CARVEL STORES OF NEW YORK, INC., CARVEL DARI-FREEZE STORES, INC., CARVEL STORES REALTY CORPORATION, EAGLE CONE CORPORATION, H. P. HOOD & SONS, *Respondents.*

Civil File No. 60 Civil 1990

PAUL S. GIBERMAN and GERTRUDE GIBERMAN, *Petitioners,*

against

CARVEL STORES OF NEW YORK, INC., CARVEL DARI-FREEZE STORES, INC., CARVEHICLE CORP., CARVEL CORPORATION, CARVEL STORES OF PENNSYLVANIA, INC., CHAIN LOCATIONS OF AMERICA, INC., RAKESTRAW'S DAIRY PRODUCTS, INC., *Respondents.*

Civil File No. 60 Civil 2042

JOSEPH PAZDRO and YOLANDA PAZDRO, *Petitioners,*

against

CARVEL STORES OF NEW YORK, INC., CARVEL DARI-FREEZE STORES, INC., CARVEL CORPORATION, CARVEL STORES OF PENNSYLVANIA, INC., CHAIN LOCATIONS OF AMERICA, INC., RAKESTRAW'S DAIRY PRODUCTS, INC., *Respondents.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SIDNEY W. ROTHSTEIN,
Attorney for Petitioners,
350 Broadway,
New York City.

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IN THE

Supreme Court of the United States

October Term, 1964

No.

Civil File No. 150-212

BERNARD SUSSER, GERTRUDE SUSSER and SHIRLEY SCHWARTZ, *Petitioners,*

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CARVEL CORPORATION, CARVEL DARI-FREEZE STORES, INC., CARVEL STORES REALTY CORPORATION, EAGLE CONE CORPORATION, H. P. HOOD & SONS, *Respondents.*

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CARVEL STORES OF NEW YORK, INC., CARVEL DARI-FREEZE STORES, INC., CARVEL STORES REALTY CORPORATION, EAGLE CONE CORPORATION, H. P. HOOD & SONS, *Respondents.*

(Continued on Next Page)

Civil File No. 60 Civil 63

JAMES P. PIERCE, RITA PIERCE, LYLE FREDERICK, LEROY M. FREDERICK, ALFRED MUELLER and SOL RODENS, *Petitioners,*

against

CARVEL STORES OF NEW YORK, INC., CARVEL DARI-FREEZE STORES, INC., CARVEL CORPORATION, CARVEL STORES OF PENNSYLVANIA, INC., CHAIN LOCATIONS OF AMERICA, INC., RAKESTRAW'S DAIRY PRODUCTS, INC., *Respondents.*

Civil File No. 60 Civil 1096

MATTHEW SEU and JANE L. SEU, *Petitioners,*

against

CARVEL CORPORATION, CARVEL STORES OF NEW YORK, INC., CARVEL DARI-FREEZE STORES, INC., CARVEL STORES REALTY CORPORATION, EAGLE CONE CORPORATION, H. P. HOOD & SONS, *Respondents.*

Civil File No. 60 Civil 1990

PAUL S. GIBERMAN and GERTRUDE GIBERMAN, *Petitioners,*

against

CARVEL STORES OF NEW YORK, INC., CARVEL DARI-FREEZE STORES, INC., CARVEHICLE CORP., CARVEL CORPORATION, CARVEL STORES OF PENNSYLVANIA, INC., CHAIN LOCATIONS OF AMERICA, INC., RAKESTRAW'S DAIRY PRODUCTS, INC., *Respondents.*

Civil File No. 60 Civil 2042

JOSEPH PAZDRO and YOLANDA PAZDRO, *Petitioners,*

against

CARVEL STORES OF NEW YORK, INC., CARVEL DARI-FREEZE STORES, INC., CARVEL CORPORATION, CARVEL STORES OF PENNSYLVANIA, INC., CHAIN LOCATIONS OF AMERICA, INC., RAKESTRAW'S DAIRY PRODUCTS, INC., *Respondents.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit.

Opinions Below

The opinion of the United States Court of Appeals for the Second Circuit is not yet reported, but is printed as Appendix A to this petition. The opinion of the trial court is reported in 206 F. Supp. 636 and is set forth herein as Appendix B.

Jurisdiction

The judgment of the United States Court of Appeals for the Second Circuit was entered May 8, 1964. The jurisdiction of this Court in invoked under Title 28 U. S. C. 1254(1).

Questions Presented

1. Whether the admitted sales policy and practice of the Carvel respondents, whereby they conditioned their franchise to retail dealers, the use of their trade marks and the sale and lease of their patented equipment, upon the dealer's purchase, use and sale in connection therewith other unpatented products of said respondents, violates Section 3 of the Clayton Act.

2. Whether such admitted tie-in sales are per se violations of Section 3 of the Clayton Act.

3. Whether an exclusive dealing contract, where it is an integral part of a proscribed tie-in arrangement, is a per se violation of Section 3 of the Clayton Act.

4. Whether trademark protection justifies proscribed tying and exclusive dealing contracts.

5. Whether the agreements between Carvel and the supplier respondents, whereby the latter are obliged to refrain from dealing with or selling to petitioners, violate the Sherman Act.

6. Whether the admitted practice and policy of the Carvel respondents constitutes unlawful price maintenance in violation of the Sherman Act.

Statutes Involved

Title 15, United States Code.

§ 1. Trusts, etc., in Restraint of Trade Illegal: Exception of Resale Price Agreements: Penalty

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: July 2, 1890. C. 647, § 1, 26 Stat. 209; Aug. 17, 1937, c. 690, Title VIII, 50 Stat. 693; July 7, 1955, c. 281, 69 Stat. 282.

§ 14. Sales, etc., on Agreement not to use Goods of Competitor

It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities whether patented or unpatented, for use, consumption or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies, or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create

a monopoly in any line of commerce. Oct. 15, 1914, c. 323, § 3, 38 Stat. 731.

Statement of the Case

Petitioners were plaintiffs in nine private antitrust suits brought in the Southern District of New York. Each was or had been a franchisee of one of the Carvel respondents. There was a joint trial before the court on the issue of liability alone. Petitioners agreed to rely solely on per se violations and to limit their evidence to written agreements and other documents.

The several Carvel corporate respondents (referred to collectively as Carvel) franchise independent dealers to manufacture and sell at retail, under various Carvel trademarks, a soft ice cream product. Patented, as well as unpatented, equipment is both sold and leased to the dealer by Carvel, and the franchise agreement requires him to (a) purchase from Carvel or approved sources his entire requirements of ice cream mix and all other ingredients used in the manufacture and sale of the end product; (b) to use only such products with such equipment; (c) to sell no other product other than that processed from Carvel mix through Carvel freezers; (d) to refrain from selling or dealing in any unauthorized products; and (e) to devote his store and premises solely to the sale of Carvel frozen dairy products. Upon termination of the franchise, the dealer is obligated to refrain from engaging in a similar business for five years and within a radius of 25 miles of his store.

The supplier respondents (Eagle Cone Corporation, H. P. Hood & Sons, and Rakestraw's Dairy Products, Inc.) each contracted to sell Carvel all of Carvel's requirements of ice cream mix and cones, which Carvel in turn resold to the dealers. The effect of such contracts was to obligate the supplier to refrain from dealing with the franchisee. Additionally, under the Hood and Rakestraw's agreements,

these suppliers agreed to deliver only Carvel mix to the dealers and no other ice cream mix or ice cream preparation of any kind.

It is undisputed that each dealer was an independent businessman operating a store, usually a roadside stand, where he manufactured and sold at retail ice cream products from and with supplies and equipment acquired from and furnished exclusively by Carvel. His activities were controlled and dictated not only by the franchise agreement but by the Standard Operating Procedure Manual (SOP) which, by agreement, was an integral part of the franchise. Carvel also maintained a system of supervision to report on the dealer's use or sale of unauthorized material. Such unauthorized use or sale could subject the dealer to forfeiture of his franchise, his capital investment and his ability to continue in a similar business.

Respecting prices charged by the dealer, Carvel exacted requirements of "recommended" and "standard" prices, insisted upon the maintenance of ten cent and twenty cent prices on cones, specified the minimum portions in all end products, prohibited sales at less than standard prices without prior approval, solicited the cooperation of dealers to report price deviations in order to secure adherence to recommended and standard prices, promoted agreements between dealers to maintain a level of prices and specified point-of-sale signs and other advertising material required to be used by the dealer and containing prices established by Carvel.

In addition to the franchise, Carvel leased to petitioners the land on which their stores stood. Petitioners in turn gave to Carvel a conditional reassignment of their leases to become effective upon breach of the lease or of the franchise agreement. The leases also provided that breach of the franchise constituted breach of the lease.

In 1959, Carvel franchised stores numbered between 350 and 400 and were located in at least nine states. In 1960, Carvel's gross sales of ingredients and supplies totaled $3,965,923. Equipment sales increased this figure to $4,460,689. The sales of ice cream mix alone in 1960 totaled $2,611,324.

Reasons for Granting the Writ

There are several important reasons why the Writ of Certiorari should be granted in this case:

1. The partial dissent of Judge Lumbard who found that "plaintiffs * * * proved the essentials of a tying arrangement proscribed by the Clayton Act".

2. The initial decision of a Federal Trade Commission hearing examiner who found, despite the Court of Appeals decision in this case, that the Carvel franchise agreements and policing activities are unlawful (1964 CCH Trade Regulations Reports, pars. 16440, 16921).

3. The apparent modification of the *per se* rule by the District Court's and Court of Appeals' decisions immunizing a trademark owner from the proscriptions of the antitrust laws.

4. The presumption of the requisite economic leverage, sufficient to invalidate a tying arrangement, from the use of the Carvel trademarks.

5. The franchise system, together with its ramifications, which has had a phenomenal growth in our post-war economy, presents a matter of first impression to this court.

The *per se* rule is applicable. It has been clearly delineated and firmly established by this Court. *International Business Machines Corporation* v. *U. S.*, 298 U. S. 131, 56 S. Ct. 701; *Morton Salt Co.* v. *G. S. Suppiger Co.*, 314 U. S. 483, 62 S. Ct. 402; *Times-Picayune Pub. Co.* v. *U. S.*,

345 U. S. 594, 73 S. Ct. 872; *Black* v. *Magnolia Liquor Company*, 355 U. S. 24, 78 S. Ct. 106; *International Salt Co.* v. *U. S.*, 332 U. S. 392, 68 S. Ct. 12.

It is clear that the Carvel system of operation involves the sale, loan or lease of patented and unpatented equipment as well as the use of trademarks, on condition that the dealer use same only in conjunction with Carvel mix and other equipment and supplies required to be purchased from Carvel, and no other. Such agreements constitute *per se* violations of § 1 of the Sherman Act when the party imposing the condition has a dominant position with respect to the tying product and a not insubstantial volume of interstate commerce is affected. *Northern Pacific Railway Company* v. *U. S.*, 356 U. S. 1, 78 S. Ct. 514.

The *Northern Pacific Railway Company* case defined "monopoly power" or "dominance" over the tying product as nothing more than "sufficient economic power to impose an appreciable restraint on free competition in the tied product" (pp. 11, 521). And it is established that a patent is sufficient to supply the requisite of "dominance" for the application of the *per se* rule of unreasonablness to tying arrangements.

Assuming, as the concurring opinion stated, that the patented items involved "cannot realistically be considered the 'tying product' or the focus of the arrangement", it is urged that the use of the Carvel trademark, found by Judge Lumbard to be the "principal feature of the Carvel franchise system", supplies the requisite economic power which this Court defined in the *Northern Pacific Railway* case. Nor can a license to use a trade name sanction unlawful restraints such as are here involved. *Dictograph Products, Inc.* v. *F. T. C.*, 217 F. 2d 821. And this Court has earlier held that a valid trademark licensing system may not be implemented by restraints of trade which extend beyond protection of the mark. *Timken Roller Bearing Co.* v. *U. S.*, 341 U. S. 593.

The protection of good will as a justification for tying arrangements has been firmly rejected. *International Salt Co., Inc.* v. *U. S.*, 6 F. R. D. 302 (aff'd 332 U. S. 392, 68 S. Ct. 12); *International Business Machines Corporation* v. *U. S., supra; Dictograph Products, Inc.* v. *F. T. C., supra.* The involvement of food or health considerations does not alter this principle. *Ethyl Gasoline Corp.* v. *U. S.*, 309 U. S. 436, 60 S. Ct. 618; *Automatic Canteen Co.* v. *F. T. C.*, 194 F. 2d 433; *Sylvania Industrial Corp.* v. *The Visking Corp.*, 132 F. 2d 947.

In this connection, we had urged upon the trial that the protection of the Carvel name could be validly accomplished through definition of specifications of standards for the different products used. In rejecting this, the trial court found "that the agreements indicate that Carvel would approve the use of accessory supplies from alternate sources of supply if an adequate check on standards could be maintained." This finding is *not* supported by the agreements and is completely erroneous.

Of particular significance in considering Carvel's intent and purpose to eliminate and foreclose competition is the franchise provision restricting the dealer from engaging in a similar business in the event of termination of his franchise. It is noteworthy that although the franchise granted the dealer a relatively small exclusive territory, the restriction against his engaging in a similar business after termination covered a radius of 25 miles. Since, once his franchise terminated, he would no longer use the Carvel name, he could not conceivably damage Carvel's trademark. Under such circumstances, the prohibition against engaging in a similar business in so large an area was an unreasonable restraint of trade and was obviously designed as such. The subject was treated in *Dictograph Products, Inc.* v. *Federal Trade Commission*, 217 F. 2d 821, where the court said at page 823:

> "There are various terms of the agreement which serve to implement the exclusive dealing features,

the most important of which is the following restrictive covenant which applies in case the agreement be cancelled by either party as would doubtless be the result of any persistent attempt by the distributor to sell the hearing aids of competitors.

21. In the event of the termination of this agreement by either party distributor expressly covenants and agrees that for a period of one year from the date of said termination the distributor will not directly or indirectly carry on or be engaged, employed or interested in any hearing aid business within the territory outlined in Paragraph 2 hereof * * *."

In passing, some comment should be made with reference to the last paragraph in the Court of Appeals' decision respecting the minimal damages involved. The record does not justify this passage since the trial proceeded solely on the question of liability and no effort was made to prove damages.

So far as price maintenance is concerned, it is firmly established that any fixing of prices by two or more persons violates Section 1 of the Sherman Act (except, of course, for "fair trade" agreements), *U. S.* v. *Socony Vacuum Oil Co.*, 310 U. S. 150, 60 S. Ct. 811; *U. S.* v. *Bausch & Lomb Optical Co.*, 321 U. S. 707, 64 S. Ct. 805; *U. S.* v. *Bitz*, 159 F. Supp 80, and this is so whether the price fixing is at the wholesale or retail level. *Crane Distributing Company* v. *Glenmore Distilleries*, 267 F. 2d 343. And price fixing, absent authorizing statutes, is illegal *per se*. *U. S.* v. *Line Material Co.*, 333 U. S. 287, 68 S. Ct. 550.

We submit that the trial court misconceived and inhibited our efforts to prove this aspect of the case. We sought to present many documents from which a price fixing pattern might emerge, but the trial judge stated:

"You are not going to get it by just little drabs and drabs of evidence. You have to be able to prove

> that there was a contractual obligation with these franchise owners that they would sell only at a fixed price. If you do that these become irrelevant. If you don't do it, you haven't established your case" (emphasis supplied).

This was clearly error and prejudicial. For it is fundamental that the illegality of a price maintenance arrangement may be shown by a system of policy, combinations or cooperative efforts. *Armand Co.* v. *Federal Trade Commission*, 78 F. 2d 707. The Supreme Court held in *Federal Trade Commission* v. *Beech-Nut Packing Co.*, 257 U. S. 441, 42 S. Ct. 150, which also involved "suggested" prices, that proof of illegal price maintenance needs no specific contract but may be shown by the defendant's methods in securing the cooperation of its dealers which are as effectual as agreements. And in the recently decided case of *U. S.* v. *Parke Davis and Company*, 362 U. S. 29, 44, 80 S. Ct. 503, 512, the court amplified the Beech-Nut doctrine and held that judicial inquiry will not stop with a search of the record for evidence of purely contractual arrangements.

The concurring opinion held inferentially that the restraints are valid because of "the problem of controlling something so insusceptible of precise verbalization as the desired texture and taste of an ice cream cone or sundae". This completely overlooked the testimony of the same witness, to whom the Court of Appeals referred in support of its finding, that taste and texture could not be controlled since the dealer could dilute the product by not freezing or mixing it properly or by not using proper ingredients or in the desired proportions, and that in the final analysis, the quality depended upon the man doing the job in the store. Also ignored was the fact that Carvel did not manufacture and sell to the dealer any finished product of measurable standards of quality. Nor did any of the Carvel trademarks attach to any of the end products, as such, manufactured and sold by the dealer. Carvel merely supplied the ingredients and the end product was the creation of the dealer.

Conclusion

There can be no question but that the Carvel system has the capacity, tendency and effect to suppress competition in a particular line of commerce. The validity of the agreements involved, in view of the impact upon the business world of the franchise system, requires a searching analysis of that type of operation.

The Court of Appeals as well as the District Court apparently relied upon the supposed difficulty of providing detailed specifications to the dealers. However, the sole evidence in the record was the testimony that it was *merely* difficult to police the dealers. Contrariwise, the evidence did reveal that detailed specifications were in fact furnished to Carvel's suppliers and further reveals that Carvel was able to extensively police each dealer's operation. It follows, therefore, that if the restraints imposed were for the purpose of trademark or good-will protection, this result could have been accomplished by Carvel furnishing its dealers with the same specifications it had already furnished its suppliers.

In the famous *Standard Stations* case (337 U. S. 293, 69 S. Ct. 1051) this court stated (pp. 306, 1058):

> "The only situation, indeed, in which the protection of good will necessitate the use of tying clauses is where specifications for a substitute would be so detailed that they could not practicably be applied."

Thus, with the record devoid of evidence to bring this case within the foregoing exception, and with the admission that detailed specifications were in fact supplied, if only to the approved suppliers, there can be no justification for the restrictive provisions.

It is therefore respectfully urged that the judgment of the United States Court of Appeals for the Second Circuit should be reversed, and to that end the writ herein prayed for should issue.

Respectfully submitted,

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Attorney for Petitioners.

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APPENDIX A

Opinion of the United States Court of Appeals for the Second Circuit, May 8, 1964

No. 96—September Term, 1963.

(Argued October 24, 1963 Decided May 8, 1964.)

Docket No. 28206

BERNARD SUSSER, *et al.*,
Plaintiffs-Appellants,

—v.—

CARVEL CORPORATION, CARVEL DARI-FREEZE STORES, INC., CARVEL STORES REALTY CORPORATION, *et al.*,
Defendants-Appellees.

AND EIGHT OTHER CASES,

Southern District of New York Civil File Numbers 150-212, 152-119, 152-120, 153-193, 60 Civil 63, 153-194, 60 Civil 1096, 60 Civil 1990, and 60 Civil 2042.

Before:

LUMBARD, *Chief Judge,*
MEDINA and FRIENDLY, *Circuit Judges.*

Appeals from judgments of the United States District Court for the Southern District of New York, Archie O. Dawson, *J.*, which dismissed the plaintiffs' complaints charging violations of the antitrust laws and fraudulent misrepresentations. 206 F. Supp. 636 (S. D. N. Y. 1963).

Affirmed.

Opinion of the United States Court of Appeals for the Second Circuit, May 8, 1964

SIDNEY W. ROTHSTEIN, New York, N. Y. (Joseph L. Klein, Greenfield, Rothstein & Klein, New York, N. Y., on the brief), *for plaintiffs-appellants Bernard Susser, et al.*

HERMAN L. WEISMAN, New York, N. Y. (Herbert F. Roth, Amen, Weisman and Butler, New York, N. Y., on the brief), *for defendants-appellees Carvel, et al.*

WILLIAM G. MULLIGAN, New York, N. Y., *for defendant-appellee Rakestraw's Dairy Products.*

JOHN A. WILSON, New York, N. Y. (Willard M. L. Robinson, Shearman & Sterling, New York, N. Y., on the brief), *for defendant-appellee H. P. Hood & Sons, Inc.*

IRVING L. WEINBURGER, New York, N. Y. (Albert L. Wigor, New York, N. Y., on the brief), *for defendant-appellee Eagle Cone Corporation.*

LUMBARD, *Chief Judge* (writing for the majority in part and dissenting in part):

The plaintiffs in nine actions which were tried together in the Southern District of New York appeal from the dismissal of their complaints which alleged violations of the antitrust laws and sought treble damages from the Carvel Corporation, a New York corporation which manufactures dairy and primarily soft ice cream products, its subsidiary organizations, certain of its individual officers and attorneys, and a number of its suppliers. The plaintiffs, former and present individual operators of Carvel franchise outlets in Massachusetts, Connecticut and Pennsylvania, also

charged the Carvel defendants with fraudulent misrepresentations in the franchise negotiations.

After a separate trial of the fraud charges, Judge Dawson, sitting without a jury, dismissed the complaints as to these charges on February 7, 1962. The issue of liability on the antitrust causes of action was tried separately before Judge Dawson without a jury. The plaintiffs alleged that Carvel had unlawfully fixed the prices of the retail products sold at the franchise stores and that the franchise agreements embodied tying and exclusive dealing arrangements violative of the Sherman and Clayton acts. The complaints also charged that the contracts between Carvel and the supplier defendants embodied concerted refusals to deal with the plaintiffs violative of the antitrust laws. In a pre-trial order the plaintiffs stipulated that they would rely solely upon "per se" violations of the antitrust laws as shown in certain written agreements and other documents. From a judgment which, with one exception,[1] dismissed the complaints against all the defendants on the ground that the plaintiffs had failed to prove violations of the antitrust laws, 206 F. Supp. 636 (S. D. N. Y. 1963), the plaintiffs appeal.

The Carvel Franchise System

Although the franchise operators conduct their stores as independent businessmen, through provisions in the franchise agreement Carvel is able to maintain a chain of 400 stores uniform in appearance as well as in operation. The dealer is obligated to conduct his business in accordance with a Standard Operating Procedure Manual (Manual) which governs in great detail the general operation of the store, including the types of products which may be offered for sale, the recipes for their preparation, the nature and

[1] Judge Dawson held invalid the pricing provisions of the pre-1955 franchise agreement.

placement of advertising displays in the store, the color of the employees' uniforms, and the hours when the store lights must be turned on. The stores are identical in design, each featuring the Carvel crown and cone trademark on a flat slanting roof, glass walls at its front, and the name "Carvel" on its sides in neon lights. This distinctive design is protected by a design patent. The ice cream, which is processed from a mix prepared from a secret formula, is dispensed from a patented machine, which bears the Carvel name or trademark. The paper containers, ice cream cones, and spoons all bear the Carvel name and in some instances are unique in design.

The Carvel chain of franchise stores has grown from approximately 180 in 1954 to approximately 400 at the time of trial in 1962. The stores are presently located throughout the eastern portion of the United States from Maine to Florida and as far west as Wisconsin. Their annual gross sales are from six to eight million dollars. Carvel's sales to the stores of supplies, equipment, and machinery reached a high point of $5,532,396 in 1957 and in 1960 totalled $4,460,689.

Special counsel retained by Carvel in 1955 for that purpose drafted a new form of the franchise agreement. The plaintiffs in four of the actions entered into franchise agreements prior to 1955; the plaintiffs in the remaining actions became franchisees after 1955. Both agreements and the corresponding Manuals must therefore be scrutinized. The new agreement effected two important changes. First, whereas under the earlier agreement the franchise dealer was obligated to sell Carvel produets at prices fixed by the parent organization, the new agreement explicitly provides that the dealer has the right to fix his own prices. Second, under the earlier agreement the dealer was obliged to purchase his entire requirements of supplies, machinery, equipment, and paper goods from Carvel or Carvel ap-

proved sources. The new agreement requires the purchase from Carvel or Carvel approved sources only of those supplies which are a part of the end product sold to the public and permits the dealer to purchase machinery, equipment, and paper goods from independent sources so long as his store is maintained in accordance with the Manual specifications.

PRICE-FIXING

It is undisputed that the pre-1955 Manual established "standard selling prices" to which the dealers were obligated to adhere. The pre-1955 franchise required the dealers "To maintain prices on products designated in, and as per Carvel Standard Operating Procedure and not to conduct any reduced price sales of these items without written consent from Carvel." Judge Dawson held that these price-fixing provisions were illegal and that the four plaintiffs who had entered into the earlier franchise were entitled to a trial on the issue of damages. No appeal was taken from this aspect of the judgment below.[2]

The revised franchise provides: "The dealer shall have the right to sell Carvel's Frozen Dairy Product and/or other items authorized for sale by him under the terms of this agreement at any price that the dealer determines. Wherever Carvel recommends a retail price, such recommendation is based upon Carvel's experience concerning all factors that enter into a proper price, but such recommendation is in no manner binding upon the dealer." The appellants contend that notwithstanding this provision Carvel effectively continued to fix prices at which Carvel

[2] In accordance with Rule 54(b) of the Federal Rules of Civil Procedure Judge Dawson, finding no good reason for delay, directed the entry of judgments in all the actions, although damages were yet to be ascertained in four of the cases.

products were sold to the public and that Judge Dawson's finding to the contrary is clearly erroneous.

Even in the absence of express contractual provisions which evidence an unlawful scheme, a charge of unlawful price-fixing may be substantiated by proof of a course of conduct by which the seller or licensor effectively maintains control of the ultimate retail price at which a product is sold. *Federal Trade Commission* v. *Beech-Nut Packing Co.*, 257 U. S. 441 (1922). The appellants direct our attention to the fact that six pages of the revised Manual continued to refer to "Standard selling price"; that in letters to several dealers Carvel emphasized that only 10¢ and 20¢ cones were prescribed by the Manual and that the minimum portions prescribed by the Manual were mandatory; that Carvel sought to have dealers report to it any deviation by other dealers from the requirements of the Manual; and that Carvel suggested that dealers seek its permission before conducting a sale at prices other than those established in the Manual. Moreover, the appellants emphasize the existence of a board of governors consisting of various dealers appointed by Carvel, the function of which is to make recommendations concerning the suggested retail selling price of Carvel products.

As Judge Dawson noted, the mere existence of a means whereby retail price levels are recommended is not sufficient to establish a violation of the Sherman Act, unless there is a showing of an attempt to enforce a price structure upon the retail tradesmen. See *Maple Flooring Mfrs. Ass'n* v. *United States*, 268 U. S. 563 (1925); *Cement Mfrs. Protective Ass'n* v. *United States*, 268 U. S. 588 (1925). Here, the franchise provisions explicitly reserved to the individual dealer the right to set whatever price he desired. And, by contrast with the letters to which the appellants referred, Carvel introduced in evidence bulletins circulated to all the dealers as well as letters sent to several emphasiz-

ing that Carvel had changed its prior pricing policy and that each dealer now had the right to set his own prices, although Carvel did indicate that its suggested retail prices were based upon its own broad experience in customer sales.

Fred Vettel, Carvel's general manager since 1955, testified that the board of governors operated primarily as a medium for the interchange of ideas among a representative group of individual franchise dealers. He further stated that since sometime in 1957 Carvel had made available to the dealers advertising displays which left blank spaces for those dealers who wished to insert prices other than those suggested by the Carvel organization, although the appellants adduced evidence that on some occasions requests for such posters were refused.

In short, the evidence was contradictory on the question whether Carvel attempted to impose a binding price structure on the retail dealers. It is not the duty of this court to consider *de novo* the conflicting evidence and resolve this factual issue; rather, we must review the determination of the district court to determine whether or not it is clearly erroneous. See *Ruby* v. *American Airlines, Inc.*, 2d Cir., Docket No. 28473, February 14, 1964, pp. 998-1002; *United States* v. *National Ass'n of Real Estate Boards*, 339 U. S. 485, 494-96 (1950). There is much evidence to support Judge Dawson's finding of fact that Carvel did not engage in an unlawful price-fixing scheme, and we cannot say that Judge Dawson's conclusion was clearly erroneous.[3]

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[3] We thus need not decide whether the products allegedly the subjects of unlawful price-fixing were sufficiently a part of interstate commerce to sustain a charge of Sherman Act violation.

Opinion of the United States Court of Appeals for the Second Circuit, May 8, 1964

EXCLUSIVE DEALING AND TYING ARRANGEMENTS

The appellants maintain that the franchise agreements embody violations of the Sherman[4] and Clayton[5] acts insofar as they require the dealer to refrain from selling any non-Carvel product and insofar as they obligate the dealer to purchase directly from Carvel or from a source approved by Carvel his supply not only of the basic Carvel ice cream mix, prepared under a secret formula, but also certain other products used in either the preparation or

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[4] Section 1 of the Sherman Act, 15 U. S. C. § 1, provides:

"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal . . ."

Section 2, 15 U. S. C. § 2, provides:

"Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

[5] Section 3 of the Clayton Act, 15 U. S. C. § 14, provides:

"It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease, or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities, whether patented or unpatented, for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia, or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in goods, wares, merchandise, machinery, supplies, or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce."

sale of the end product offered to the public. The requirement that the dealer sell solely Carvel products would, if taken alone, present an example of an exclusive dealing arrangement; the requirement that the dealer purchase not only Carvel mix but also certain other products would, if taken alone, present an example of a tying arrangement. Inasmuch as the Supreme Court has erected a much more stringent test of legality with which to measure tying arrangements than that which is applied to exclusive dealerships, we consider first the appropriate standard to be applied where both provisions are embodied in a single contractual relationship.

We can find no justification for treating the tying aspects of an agreement which embodies exclusive dealing aspects as well any differently than we would treat a tying arrangement alone. The fundamental economic evil in a tying arrangement deemed unlawful under the antitrust laws lies in the ability of a producer who possesses market dominance in one particular product to impose upon his vendee the obligation to purchase other products as to which the producer possesses no market dominance and the consequent foreclosure to other producers of the non-dominant products of such markets for their merchandise. Certainly the economic impact of such an arrangement is in no respect diluted by inclusion of provisions which restrict the vendee solely to the use or sale of the producer's products. We shall therefore measure the tying aspects of the Carvel franchise by the more stringent standard of legality established by the Surpreme Court and the exclusive dealing aspects by the more liberal standard.

As noted above, the pre-1955 franchise obligated the dealer to "purchase and use only standard Carvel approved printed paper goods, napkins, cones, extracts, spoons, and all other Carvel products at standard market prices." The post-1955 franchise requires the dealer to purchase from

Carvel or approved sources his entire requirements of all items sold as a part of the retail product but permits the dealer to purchase machinery, equipment, and paper goods from sources other than Carvel so long as the operation is maintained in accordance with the Manual specifications.[5a]

The Tying Arrangements

Tying arrangements have been given short shrift under the antitrust laws. *International Business Machine Corp.* v. *United States*, 298 U. S. 131 (1936); *International Salt Co.* v. *United States*, 332 U. S. 392 (1947); *Times-Picayune Publishing Co.* v. *United States*, 345 U. S. 594 (1953); *Northern Pacific Railway Co.* v. *United States*, 356 U. S. 1 (1958); *United States* v. *Loew's, Inc.*, 371 U. S. 38 (1962). See generally Turner, The Validity of Tying Arrangements Under the Antitrust Laws, 72 Harv. L. Rev. 50 (1958). Yet it seems clear that in compelling circumstances the protection of goodwill, as embodied for example in a valuable trademark, may justify an otherwise invalid tying arrangement. But "[t]he only situation, indeed, in which the protection of good will may necessitate the use of tying clauses is where specifications for a substitute [for the tied product] would be so detailed that they could not practicably be supplied." *Standard Oil Co.* v. *United States*, 337 U. S. 293, 306 (1949). The threshold question is thus whether the Carvel franchise embodies a tying arrangement and, if so, whether that arrangement can be justified as necessary for the protection of Carvel's goodwill.

A tying arrangement may be defined as an agreement under which the vendor will sell one product only if the purchaser agrees to buy another independent product as

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[5a] The post-1955 agreement provides that "[i]n the event that the Dealer desires to purchase his printed goods from sources other than Carvel, Carvel shall license manufacturers of such products to print the Carvel name thereon in connection with sales to the Dealer, with products made in accordance with Carvel standards."

well. Two types of economic injury characteristically arise from such an arrangement: first, foreclosure to the vendee of alternate sources of supply for the second, or tied, product; and second, foreclosure of possible market outlets to other competing suppliers of the tied product. The source of this injury—and the fundamental element which requires that such arrangements be deemed illegal—lies in the vendor's "sufficient economic power with respect to the tying product to appreciably restrain free competition in the market for the tied product." *Northern Pacific Railway Co.* v. *United States, supra,* at p. 6. Such power may be found either in the vendor's dominance of the market in the tying product or in its uniqueness or particular appeal to the consumer. *United States* v. *Loew's, Inc. supra,* at p. 45.

My brothers would affirm the judgment of the district court in all respects. With regard to the allegations of unlawful tying arrangements, they reason that the plaintiffs limited themselves by pre-trial stipulation to reliance solely on "per se" violations of the antitrust laws and since they failed to establish Carvel's market dominance and that a substantial amount of commerce is affected they have failed as well to make out a *per se* violation of the antitrust laws. I cannot agree.

The stipulation, in relevant part, states only that the plaintiffs will rely on *per se* violations and that their proofs will be limited to the written franchise agreements, other documents supplementary thereto, and the testimony of two individuals taken prior to trial, one of whom was Fred Vettel, Carvel's general manager. The effect of this stipulation seems clear to me. The plaintiffs agreed that they would go no further than the documentary evidence alluded to in attempting to make out their claims of antitrust violation. The only question is whether the plaintiffs in fact introduced sufficient evidence to make out an antitrust violation by the Carvel defendants. I think they did.

The nature of their stipulation and the label they gave it is wholly immaterial to that question. I cannot see what can possibly turn on the fact that the plaintiffs limited themselves to what the stipulation termed "per se violations."

The court's focus must be entirely on the state of the record. The crucial question is whether the record satisfies the requirements of proof of an antitrust violation. Each element of a tying arrangement must be considered in turn.

Does Carvel possess the requisite economic leverage? Despite the absence in the record of substantial economic data, in the light of the Supreme Court's decision in *United States* v. *Loew's, Inc., supra,* I believe that such power may be presumed from the use of the Carvel trademark as the principal feature of the Carvel franchise system. In *Loew's,* the Court declared that "when the tying product is patented or copyrighted . . , sufficiency of economic power is presumed." 371 U. S. at 45 n. 4. I can find little reason to distinguish, in determining the legality of an allegedly unlawful tying arrangement, between the economic power generated by a patent or copyright on the one hand and that generated by a trademark on the other. In all three cases, the Congress has granted a statutory monopoly which places in the hands of the owner the right, within the limitations of federal law, to do as he will with the protected product. The value of the patent, copyright or trademark is, of course, directly proportionate to the consumer desirability of the protected product.

I can find no reason not to extend this presumption of economic power to trademarks.[6] In any event, the claims

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[6] The protection given to trademarks is in some respects even more extensive than that given either patents or copyrights. The duration of a trademark, for example, may, during continued use, be extended beyond 20 years without limit of time, 15 U. S. C. §§ 1058-59, whereas a patent expires after 17 years, 35 U. S. C. § 154, and a copyright after 28 years, subject to a renewal period of 28 years, 17 U. S. C. § 24.

which Carvel itself proffers lend added weight to the presumption, for Carvel's claim of economic justification is founded upon the substantial value of its trademark and the necessity for contractual restraints upon its dealers to protect that value. No doubt the recent growth of the Carvel chain from 180 to 400 stores has been attributable in great measure to the increasing value of the Carvel trademark in terms of consumer appeal and the concomitant increase in economic power generated by that trademark. The essential element in the Carvel franchise is the trademark license agreement which permits the dealer to display, label and sell its retail products as "Carvel" products. To reinforce its basic trademark Carvel also possesses some nine design patents covering its building structure, advertising displays, freezers and other apparatus, three patents covering machinery and some twenty trademarks in varying forms for use with the wide variety of products which are merchandised at the franchise stores.[6a] It is the lease or license of the trademark itself, buttressed by this array of patents and subsidiary trademarks, to which are tied the other products.

Having concluded that the Carvel trademark presumptively generates sufficient economic power, we must consider two arguments advanced to support the proposition that the Carvel franchise in any event does not embody an unlawful tying arrangement within the provisions of the Clayton Act. First, it is contended that section 3 of that act condemns only agreements which obligate the purchaser not to "use or deal in the goods . . . of a competitor or competitors of the lessor or seller," and that since Carvel does not compete

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[6a] Exhibit C-2, introduced by the Carvel defendants, is comprised of these 32 patents, design patents, and trademarks, including, for example, design patent #169,055, issued on March 24, 1953, covering the building structure; patent #2,731,925, issued on January 24, 1956, covering the one piece barrel end and dispenser tip; and design patent #184,983, issued April 28, 1959, covering a top unit for vending motor vehicles.

with suppliers of cones, toppings, extracts, ice cream mix and so forth there has been no improper foreclosure of competition. Generally, Carvel's suppliers accept orders directly from the dealers, bill the dealers and deliver directly to them rather than to Carvel. However, the transaction is cast in the form of a sale directly to Carvel which in turn resells the items to the individual dealers, the suppliers acting as Carvel's agents for payment and delivery. Carvel sets the prices at which these items are sold to the dealers. From the point of view of the legal form adopted, then, it is clear that Carvel does compete with other suppliers of these products. Moreover, there is little difference in economic impact between Carvel's purchasing and reselling these supplies and Carvel's production of these items in the first instance.

With regard to the foreclosure to other suppliers of the Carvel franchise stores as possible market outlets, it must be conceded that vigorous competition would probably exist among such suppliers to secure the initial contract with the Carvel organization. Nevertheless, the nature of this competition must be substantially different from that which would otherwise prevail. In view of the leverage which the Carvel corporation wields in supervising the supplying of some 400 retail outlets, competition will most likely take the form of substantial price concessions and the concomitant inability of smaller suppliers effectively to compete with larger producers who are capable of meeting Carvel's price and service demands.

Of equal significance is the economic impact of the prevailing arrangement in terms of foreclosure to the individual franchise stores of the opportunity to deal with individual suppliers. While under the franchise the dealer may enjoy lower prices on some items,[7] Carvel undoubtedly

[7] For example, the evidence indicated that an ice cream cone similar to that for which the dealers paid $4.80 per 600 to Carvel was listed on Eagle Cone Corporation's wholesale price list at $5.60 per 600, in lots of 25 cases or more.

reaps some economic benefit from its status as an intermediary.[8] There is no indication whether or not the dealers, either individually or in combination, could secure lower prices and better service from local producers of the same products. In short, in order to secure the benefits of employing the Carvel name on his retail products, the dealer has been forced to surrender his right to negotiate with suppliers of his own choice on matters such as price, delivery and other aspects of a contract of sale. Where such a surrender may be traced to the economic leverage of the other party, arising from its trademark, the elements of an unlawful tying arrangement have been established. Certainly the amount of commerce here involved is not insubstantial, in light of Carvel's sales to the franchise dealers in 1960 alone of $3,965,923 in ingredients and other supplies.

The second argument advanced in support of the proposition that the Carvel franchise does not embody a tying arrangement is that we are dealing not with a series of individual products tied together for purposes of sale, but rather with one unified product, that is the Carvel product which is ultimately consumed by the public. I do not agree. Carvel sells supplies as distinct items in large quantities—for example, ten gallons of mix, ten gallons of chocolate syrup, and so forth. Carvel itself purchases these supplies as distinct items from a wide variety of suppliers who in turn make individual deliveries to the franchise outlets. By their very nature it seems clear that there is no reason to treat these separate products as one unified product although to the ultimate consumer of an ice cream cone or a sundae they would seem to be one.

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[8] For example, the evidence indicated that Carvel charged the dealers $10.00 per thousand for ice cream cones which it purchased for $9.50 from the cone manufacturers.

The plaintiffs having proved the essentials of a tying arrangement proscribed by the Clayton Act, the burden fell upon Carvel to justify the arrangement as reasonably necessary to protect its trademark. While it is clear that some quality control is essential for the protection of Carvel's goodwill—if not required by law for a proper trademark licensing agreement, see *E. I. du Pont de Nemours & Co.* v. *Celanese Corp. of America*, 167 F. 2d 484 (Ct. of Cust. and Pat. App. 1948); *Arthur Murray, Inc.* v. *Horst*, 110 F. Supp. 678 (D. Mass. 1953); *Morse-Starrett Prod. Co.* v. *Steccone*, 86 F. Supp. 796 (N. D. Calif. 1949)—the justification for this control requires proof that the specifications for products to substitute for those offered by Carvel would be so complex and detailed as to make it impracticable for Carvel to establish such specifications. See *Standard Oil Co.* v. *United States*, *supra*, at 306.

I find the record with respect to justification of Carvel's control to be unsatisfactory and inconclusive. The evidence before Judge Dawson was for the most part documentary. With the exception of the self-serving statement in the franchise agreement that the dealer's obligation to purchase only from Carvel those items which are part of the end product is necessary "[i]n order to safeguard the integrity of Carvel's trade-marks," the documents are of little value on the issue of trademark justification. Vettel, Carvel's general manager, testified that the various toppings and other garnishments are made by the suppliers to Carvel's specifications, although not under a secret formula as is the basic ice cream mix. Vettel stated that it would be "impossible" to police the individual stores; yet he conceded, as did a representative of H. P. Hood & Sons, a supplier to Carvel of ice cream mix, that the toppings and garnishments sold by Carvel to the dealers could be purchased elsewhere on the market.

In light of this sparse showing, I am unable to find sufficient support for Judge Dawson's conclusion that the tying arrangement was justified by the necessity for Carvel to establish quality controls to protect its trademark. My brothers suggest the difficulty of "controlling something so insusceptible of precise verbalization as the desired texture and taste of an ice cream cone or sundae." Yet, since Carvel itself manufactures none of the ingredients sold to the dealers, it has itself apparently surmounted the difficulty of verbalizing the recipes for the proper preparation of its ingredients. It is especially noteworthy that in *Engbrecht* v. *Dairy Queen Co.*, 203 F. Supp. 714 (D. Kans. 1962), it was established that Dairy Queen, which operates a nationwide chain of some 3,400 soft ice cream franchise stores quite similar to Carvel's, does not require that its dealers purchase mix, toppings, or other garnishments directly from it or from approved sources, but instead it establishes specifications to govern such items and enforces these by means of periodic inspection of its franchise stores. This fact is by no means conclusive of the ability of Carvel, a somewhat smaller chain, to maintain its own standards of quality through similar controls, since the circumstances may differ, but it negates the proposition that it is logical and reasonable to infer—in the absence of proof more compelling than the mere self-serving statement of Carvel's own general manager—that it was reasonable and necessary for Carvel to embody a tying arrangement into its franchise agreement. Dairy Queen poses in striking contrast the insufficiency of the evidence adduced by Carvel to support its claim.

The antitrust aspects of the plaintiffs' claims were tried more or less as the aftermath of the far more lengthy fraud and deceit aspects of the case. Apparently because of all the time already spent in litigating the other issues, coun-

sel were urged by the district court to limit their proofs in the antitrust phase of the case essentially to documentary evidence, and this may explain as well the plaintiffs' reliance solely on "per se" violations of the antitrust laws. With the case in this posture, I would think it best to remand the cause to the district court for a further hearing limited to the issue of justification. If Carvel could establish its claim the result ultimately would be the same. If Carvel were unable to do so the plaintiffs would have sufficiently established all the elements of an unlawful tying arrangement.

The Exclusive Dealing Arrangements

As we have noted, our application of the stricter standard of legality established by the Supreme Court to the tying aspects of the Carvel franchise does not preclude us from applying the more flexible standard established by the Court for exclusive dealing arrangements to the requirement in the franchise that the dealer sell at retail only Carvel or Carvel approved products. The plaintiffs maintain that this provision erects an unlawful exclusive dealership violative of the antitrust laws. We do not agree.

In *Tampa Electric Co.* v. *Nashville Co.*, 365 U. S. 320 (1961), the Supreme Court held valid a contract between Tampa, a public utility, and Nashville, a medium sized coal company, which obligated Nashville to supply Tampa's entire requirements of coal over a twenty-year period—one form of an exclusive dealing arrangement. After discussing the necessity of delineating the relevant line of commerce and the geographical market, the Court noted that requirements contracts "have not been declared illegal *per se*" and stated that in determining whether or not the contract in issue would substantially lessen competition the courts must take into account "the relative strength of the parties, the proportionate volume of commerce involved

in relation to the total volume of commerce in the relevant market area, and the probable immediate and future effects which pre-emption of that share of the market might have on effective competition therein." 365 U. S. at 329. The Court further emphasized the significance of the possible economic justification for the accused arrangement, in light of the legitimate reasons for employing such a device.

Lacking economic data sufficient to meet the standard thus established in *Tampa Electric,* the appellants here urge that the Supreme Court's decision in *Standard Oil Co.* v. *United States, supra,* is controlling and that they need prove only that "competition has been foreclosed in a substantial share of the line of commerce affected." 337 U. S. at 314. We need not comment on whether the appellants could sustain their allegations under the doctrine enunciated in *Standard Oil,* for it seems indisputable that in *Tampa Electric* the Court deviated from the more rigorous and inflexible rule it had established in *Standard Oil* and erected criteria which demand close scrutiny of the economic ramifications of an exclusive dealing arrangement in order to determine the probable anti-competitive effects of such a device. See Bok, The Tampa Electric Case and the Problem of Exclusive Arrangements Under the Clayton Act, 1961 Sup. Ct. Rev. 267, 281-85. We find it plain that the appellants have failed to bear this burden. Instead of introducing evidence to establish the economic effects of the Carvel franchise structure, they merely protest that anti-competitive effects may be inferred solely from the existence of such a network of exclusive dealerships. But the whole tenor of *Tampa Electric* does not permit adherence to such a stringent standard of legality.

In any event, we need not rely solely upon the appellants' failure to adduce concrete evidence concerning the relevant line of commerce and geographical market and

the probable anticompetitive effects of the Carvel arrangement. For in terms of at least one factor which the Supreme Court deemed significant in *Tampa Electric*—that of economic justification—the Carvel exclusive dealership arrangement withstands any attack on its legality.

As Judge Dawson found, "the cornerstone of a franchise system must be the trademark or trade name of a product." The fundamental device in the Carvel franchise agreement itself is the licensing to the individual dealer of the right to employ the Carvel name in his advertising displays, on the products he sells, and on the store itself. The stores are uniform in design as well as in the public display of the ice cream machinery employed, the placement of advertising displays, and the products offered for sale. The requirement that only Carvel products be sold at Carvel outlets derives from the desirability that the public identify each Carvel outlet as one of a chain which offers identical products at a uniform standard of quality. The antitrust laws certainly do not require that the licensor of a trademark permit his licensees to associate with that trademark other products unrelated to those customarily sold under the mark. It is in the public interest that products sold under one particular trademark should be subject to the control of the trademark owner. See *E. I. du Pont de Nemours & Co.* v. *Celanese Corp. of America, supra; Arthur Murray, Inc.* v. *Horst, supra; Morse-Starrett Prod. Co.* v. *Steccone, supra.* Carvel was not required to accede to the requests of one or another of the dealers that they be permitted to sell Christmas trees or hamburgers, for example, which would have thrust upon Carvel the obligation to acquaint itself with the production and sale of these items so as to establish reasonable quality controls.

Nor do the antitrust laws proscribe a trademark owner from establishing a chain of outlets uniform in appearance and operation. Trademark licensing agreements requiring the sole use of the trademarked item have withstood attack

under the antitrust laws where deemed reasonably necessary to protect the goodwill interest of the trademark owner, see *Denison Mattress Factory* v. *The Spring-Air Co.*, 308 F. 2d 403 (5 Cir. 1962); *Pick Mfg. Co.* v. *General Motors Corp.*, 80 F. 2d 641 (7 Cir. 1935), and such agreements certainly are not unlawful *per se* under the antitrust laws. *Bascom Launder Corp* v. *Telecoin Corp.*, 204 F. 2d 331 (2 Cir. 1953). Judge Dawson was fully warranted in concluding that in the context of the entire Carvel franchise system the requirement that no non-Carvel products be sold at the retail level is reasonably necessary for the protection of Carvel's goodwill.

THE SUPPLIER CONTRACTS

The appellants maintain that the agreements between Carvel and its various suppliers of ice cream mix, cones, and paper products are violative of the antitrust laws insofar as they obligate the suppliers not to deal directly with the individual dealers but solely with Carvel and not to sell to the dealers any merchandise other than that approved by Carvel. We disagree.

With regard to Carvel's contracts with Hood and Rakestraw, which produced Carvel ice cream mix in accordance with a secret formula which they pledged not to divulge, it seems perfectly clear that as the possessor of a secret formula for its ice cream mix Carvel enjoyed the right to sell it to whomever it chose, and this right was not diluted by its agreement with Hood and Rakestraw to produce the mix. Carvel was free to insist that Hood and Rakestraw produce the mix solely for Carvel and subject to Carvel's wishes as to its disposition.

As for the provision in the contracts between Carvel and Hood, Rakestraw, Eagle, a cone manufacturer, and Mohawk, a manufacturer of paper products, that the sup-

pliers would not sell non-Carvel products to the individual dealers, we find no merit in the plaintiffs' claims. Carvel cannot be considered in competition with these suppliers from whom it purchases Carvel supplies, and such an agreement not to deal, even if established, when effected by non-competing enterprises is not illegal. See, e.g., *Packard Motor Car Co.* v. *Webster Motor Car Co.*, 243 F. 2d 418 (D. C. Cir.), cert. denied, 355 U. S. 822 (1957). Moreover, the plaintiffs failed to prove that they were foreclosed from alternate sources of supply or indeed that the supplier defendants themselves had been requested to make sales to the dealers and had refused.

Accordingly, the judgments of the district court are affirmed.

FRIENDLY, *Circuit Judge*, with whom MEDINA, *Circuit Judge*, joins:

Concurring with most of Chief Judge Lumbard's opinion, Judge Medina and I do not consider that a remand as to the claim with respect to the "tied" purchases of flavoring, toppings and cones is either required or warranted in the light of the pre-trial order to which plaintiffs agreed. The relevant portion of this order is as follows:

> "4. That plaintiffs agree that they are relying solely upon alleged *per se* violations of the antitrust laws and make no claim other than that their evidence will establish *per se* violations of the antitrust laws.
>
> "5. Plaintiffs' evidence at the trial on the issue of liability will be limited to (a) written agreements entered into between the Carvel defendants and the plaintiffs, and other documents supplementary thereto or explanatory thereof, (b) written agreements between the Carvel defendants and the supplier de-

> fendants, and other documents supplementary thereto and explanatory thereof, and (c) testimony heretofore taken of a Mr. Vettel and a Mr. Bittner."

It could hardly be plainer that plaintiffs were confining themselves to claims of violation of the antitrust laws which, as they thought, could be sustained without other market data than the meagre amount contained in the documents offered.

In agreeing to the pre-trial order, plaintiffs may have been relying on the inclusion of tying arrangements in the list of *per se* violations in *Northern Pacific Ry.* v. *United States,* 356 U. S. 1, 5 (1958). But, as that opinion makes clear, not every tying arrangement is illegal *per se.* Tying arrangements "are unreasonable in and of themselves whenever a party has sufficient economic power with respect to the tying product to appreciably restrain free competition in the market for the tied product and a 'not insubstantial' amount of commerce is affected." 356 U. S. at 6. See also *Times-Picayune Publishing Co.* v. *United States,* 345 U. S. 594, 608-09 (1953). More recently the Court has said that tying arrangements "may fall" in the category of *per se* violations, "though not necessarily so." *White Motor Co.* v. *United States,* 372 U. S. 253, 262 (1963).

Here the facts to which plaintiffs were limited by the pre-trial order showed neither that Carvel had "sufficient economic power with respect to the tying product to appreciably restrain free competition in the market for the tied product" nor that "a not insubstantial amount of commerce is affected." Indeed, such figures as exist would prove the contrary. In 1960 there were in New York, Connecticut and Massachusetts, 250 Carvel dealers out of a total of 125,000 outlets where ice cream cones could be purchased—amounting to one fifth of one per cent of the outlets and apparently doing about one per cent of the busi-

ness.[1] The other large Carvel states are New Jersey and Pennsylvania; the balance of a 1960 total of 400 Carvel dealers were scattered at one time over as many as 8 or 9 states from Maine to Florida and as far west as Wisconsin. These dealers competed not only with similar chains—Dairy Queen, Tastee Freez, Dari-Delite, King Kone, Dari-Isle, and others, with chains and independents utilizing mobile units, with chain stores and operations such as Howard Johnson, and with the ubiquitous corner drug-store. Although Carvel's aggregate sales are "not insubstantial," the totals shed no light on the amount of the "tied" sales here complained of, which common sense tells us must be a minor part.[2] The figures in footnotes 1 and 2 give some indication of the "insubstantiality" of the commerce affected even under the rather narrow test indicated by dictum in *Brown Shoe Co.* v. *United States*, 370 U. S. 294, 330 (1962), especially with reference to the cones, whose tie-in was hardest to justify in terms of quality control. Not only was the amount of commerce in these not consequential, but any damage to the plaintiffs was even less so. Eagle Cone's billings to Carvel averaged $460 per dealer per year, and Carvel's mark-up was slightly over 5% or about $25 per dealer;[3] whether the dealers suffered even that much dam-

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[1] The Carvel sales of Eagle Cone, which supplies all the cones for Massachusetts, Connecticut and New York, averaged $115,000 per year—about 1% of the total sales of cones in the three states.

[2] There are figures which indicate that 1960 sales of all "ingredients" other than mix to all dealers amounted to $1,354,590—or an average of less than $3,400 per dealer per year; the record does not make it clear whether all these "ingredients" were tied. Two-thirds of the figure of $3,965,923 in Chief Judge Lumbard's opinion constitute sales of the Carvel secret formula mix which surely could legally be tied to the Carvel trade-mark if that mark was to retain its significance, as he concedes.

[3] There was evidence that one of the plaintiffs had purchased $621 worth of cones in the big year, 1959; Carvel's mark-up on these would have been around $30.

age is questionable since the price Carvel charged them was less than they could have obtained if they bought in smaller quantities than Carvel, see fn. 7 to Chief Judge Lumbard's opinion. And, of course, it remained open to competing suppliers to bid for the Carvel business by soliciting that company—in itself an important contrast with cases where the tied item is produced by the seller.

Our brother Lumbard thinks the first of the deficiencies in proof as to economic power was remedied by Carvel's license of a package of trade-marks, design patents relating to the shape of the building etc., and a patented freezing and dispensing machine. We cannot agree. In the first place, the patented items cannot realistically be considered the "tying product" or the focus of the arrangement. Whatever has been said about the evils of "ties" to patented or copyrighted items is meaningful only in the situation where the desirability of the patented item is what motivates the purchaser to make further commitments or to give up some liberty of choice as to other products. See, e.g., *United States* v. *Loew's Inc.*, 371 U. S. 38, 45 (1962). In this case, the patented items appear to have been virtually without motivating significance in bringing about the agreement. The true tying item was rather the Carvel trade-mark, whose growing repute was intended to help the little band of Carvel dealers swim a bit faster than their numerous rivals up the highly competitive stream. There may, of course, be cases where a trade-mark has acquired such prominence that the coupling of some further item to its license would constitute a *per se* violation; but such a trade-mark would satisfy the market-dominance test of *Times-Picayune*, and *Northern Pacific*. The figures show that Carvel is not such a mark.

Tying arrangements differ from other *per se* violations, such as price-fixing, *United States* v. *Trenton Potteries Co.*, 273 U. S. 392 (1927), in that they can be justified on occasion, as by proof that "the protection of goodwill may

necessitate" their use "where specifications for a substitute would be so detailed that they could not practicably be supplied," *Standard Oil Co. of Calif.* v. *United States*, 337 U. S. 293, 306 (1949). Since the value of a trade-mark depends solely on the public image it conveys, its holder must exercise controls to assure himself that the mark is not shown in a derogatory light. The record affords no sufficient basis for upsetting the finding of the District Judge that "To require Carvel to limit itself to advance specifications of standards for all the various types of accessory products used in connection with the mix would impose an impractical and unreasonable burden of formulation . . ." Although instances of impossibilty of control through specification may indeed be rare in cases involving the proper functioning of mechanical elements of a machine, see *International Business Machines Corp.* v. *United States*, 298 U. S. 131, 139 (1936); *International Salt Co.* v. *United States*, 332 U. S. 392, 397-98 (1947); Turner, The Validity of Tying Arrangements under the Antitrust Laws, 72 Harv. L. Rev. 50 (1958); but see *Dehydrating Process Co.* v. *A. O. Smith Corp.*, 292 F. 2d 653 (1 Cir.), cert. denied, 368 U. S. 931 (1961); *United States* v. *Jerrold Electronics Corp.*, 187 F. Supp. 545 (E. D. Pa. 1960), aff'd *per curiam*, 365 U. S. 567 (1961), such cases are scarcely relevant to the problem of controlling something so insusceptible of precise verbalization as the desired texture and taste of an ice cream cone or sundae; that Carvel was able to specify this to its source of supply, whose product it regularly checked, does not show that administration could be confided to 400 dealers. Furthermore in most states Carvel would risk liability to anyone injured by a foreign substance in the frozen mix, see ALI, Restatement (Second), Torts 402A (Tent. Draft No. 7, 1962); although it might not be so with respect to ingredients purchased from suppliers of the dealer's own choosing, the difficulties of proof

are such that it is entitled to insist on products in which it has complete confidence. Vettel's testimony that the success of the enterprise required distinctive flavorings of uniform quality and that he considered it impracticable to handle the problem by specification and policing was sufficiently reasonable and persuasive that the judge was entitled to credit it, whether or not one of us would agree.[4] We see little force in the fact that a competitor, which licenses only freezing machines and the trade-mark and does not sell a mix made by a secret formula, is satisfied with less exacting provisions. See *Engbrecht* v. *Dairy Queen Co.*, 203 F. Supp. 714 (D. Kan. 1962). Moreover, as Vettel also explained, by packing the flavoring in tins or bags that contain exactly the amount required for a 10-gallon can of mix, Carvel encouraged the dealers to use an adequate quantity and provided an automatic control. Finally there is a limit to the amount of inspecting feasible when each dealer purchases an average of less than $12,000 a year of Carvel products (including equipment) and sells in 10¢ and 20¢ units.

Even were we to consider the patented machines and design patents to be a relevant part of the tying arrangement, the *Northern Pacific* opinion ruled out the idea, thought by some to have been implicit in earlier opinions, that proof of the license of a patented device sufficed *semper et ubique* to show the market dominance required to render a tying arrangement a *per se* violation.[5] In doing

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[4] Vettel testified that one of the specifications to the manufacturer was that certain fruits be purchased at crop site; we are at a loss to understand how this could be policed by inspection on the dealer's premises.

[5] "In arriving at its decision in International Salt the Court placed no reliance on the fact that a patent was involved nor did it give the slightest intimation that the outcome would have been any different if that had not been the case. If anything, the Court held the challenged tying arrangements unlawful *despite* the fact that the tying item was patented, not because of it." 356 U. S. at 9.

so it appropriately recognized the facts of business life. The society of patents is not egalitarian. As had been well said three years earlier, although with some dissent, in the Report of the Attorney General's Committee to Study the Antitrust Laws (1955), 238:

> "The patent may be broad and basic, in which event the economic power incident to the patent makes the tying clause illegal. On the other hand, the patent may be narrow and unimportant, in which event it may confer virtually no real market power. Accordingly, where the tying product is patented, the patentee should be permitted to show that in the entire factual setting, including the scope of the patent in relation to other patented or unpatented products, the patent does not create the market power requisite to illegality of the tying clause."

Indeed, the statement in *Northern Pacific* had been anticipated by the remark in *Standard Oil Co. of Calif.* v. *United States, supra,* at 307, that a patent is "*prima facie* evidence" of market control—evidence which was clearly rebutted here. Although there is language in *United States* v. *Loew's, Inc., supra,* at 44-48, which lends support to a theory that the mere existence of a patent of any description is not merely *prima facie* but irrebuttable evidence of market control, we find it hard to believe that the Court would thus have obliquely reversed the position taken in *Northern Pacific,* a position underscored by Mr. Justice Harlan's remarks in dissent, 356 U. S. at 17-19; the language rather must be read in the context of the Court's previous proscription of block-booking of motion picture films in *United States* v. *Paramount Pictures, Inc.,* 334 U. S. 131, 156-59 (1948), see 371 U. S. at 48. There is scant analogy between unique "hit" movies, or the tabulating and computing machines in *International Business Machines Corp.* v. *United States, supra,* as to which the defend-

ant had but one smaller competitor, or the salt-processing machines in *International Salt Co.* v. *United States*, 322 U. S. 392 (1947), and Carvel's dispensing machine by which, along with the rest of its package of distinctive devices, it had gained only 1% of the ice cream cone market in the area of its heaviest concentration, see fn. 1.

The triviality of whatever financial hardships the plaintiffs may have suffered as a result of these allegedly illegal contracts explains why they were willing to limit themselves to *per se* violations rather than incur the expense of assembling market data to gain what at best would be a negligible recovery. They have had two trials, one in which they were defeated in their claim of fraud, with a transcript of nearly 4,000 pages; we see no sufficient reason to order a third.

APPENDIX B

Opinion of Dawson, *D. J.*

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

DAWSON, *D. J.*:

I. GENERAL NATURE OF THE ACTIONS.

These are nine separate cases which were consolidated for trial. By consent of the parties the trial was held without a jury.

The plaintiffs in all cases are persons who are or were operators, under franchise agreements, of Carvel Dari-Freeze Stores at which "soft" ice cream was sold. Defendant Carvel Corporation and its subsidiaries issued the franchises, sold the basic equipment needed for operation of the stores and performed other related functions.[1] The other corporate defendants in the actions are the suppliers of various products such as ice cream mix, cones and paper goods used in connection with the dispensing of soft ice

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[1] The following subsidiaries of Carvel Corporation, a New York corporation, are defendants in these cases: Carvel Stores of New York, Inc., a New York corporation; Carvel Dari-Freeze Stores, Inc., a New York corporation; Carvel Stores Realty Corporation, a New York corporation, now known as Chain Locations of America, Inc.; Carvehicle Corporation, a New York corporation; and Carvel Stores of Pennsylvania, a Pennsylvania corporation. The name "Carvel" is used in this opinion as a general term of reference for any or all of the foregoing companies.

cream.[2] Also named as defendants were certain individuals who are or were officers or employees of Carvel.[3]

The complaints in each of the cases set forth two fundamental causes of action. The first cause of action, based on a claim that the plaintiffs were induced to enter into their franchise agreements on the basis of certain fraudulent misrepresentations made by Carvel, was previously tried in a separate trial. The opinion of the Court which decided the fraud and deceit causes of action adversely to the plaintiffs was handed down on February 7, 1962. The present opinion relates to the second fundamental cause of action set forth in the complaints which claims treble damages for alleged violations of the antitrust laws on the part of the Carvel and the supplier defendants.

By the consent of all parties, as embodied in Pre-Trial Order No. 5, dated February 7, 1962, it was provided that a joint trial of the issues of liability under the antitrust laws be held, that the issue of liability be tried separately from the issue of damages, that plaintiffs were relying solely on alleged *per se* violations of the antitrust laws and that plaintiffs' evidence on the issue of liability would be limited to written agreements between the Carvel de-

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[2] The non-Carvel corporate defendants consist of the following companies: Eagle Cone Corporation, a New York corporation; H. P. Hood & Sons, Inc., a Massachusetts corporation; Mohawk Container Company, Inc., a New York corporation; and Rakestraw's Dairy Products, Inc., a Pennsylvania corporation. The non-Carvel corporate defendants are referred to in this opinion as the supplier defendants.

[3] The actions as against these individuals, Thomas Carvel, Fred Vettel, Jr., George P. Clark, Robert J. Shallis, Agnes Carvel, Darrow Mutt, Ann M. McHugh, Stanley W. Townsend, Bruce Carvel, Mildred Arcadipane and Richard A. Cerosky, were dismissed by the Court on motion at the end of the case on the ground that no basis for any individual liability had been shown by the plaintiffs' evidence. The actions were also dismissed against Philip Agree and Arthur Marciante, former attorneys for Carvel.

fendants and plaintiffs and other documents supplementary thereto or explanatory thereof, as well as written agreements between Carvel defendants and the supplier defendants and other documents supplementary thereto and explanatory thereof. At the trial, which was held in March, 1962, both sides relied primarily on documentary evidence to establish their case.

II. Allegations of Unlawful Practices.

In regard to the antitrust causes of action the complaints all contain certain common allegations. They allege that the defendants entered into an understanding and agreement during the period encompassed by the complaint and prior and subsequent thereto whereby:

1. The supplier defendants refused to sell their respective products direct to the Carvel franchise operators but would sell only through Carvel.

2. The Carvel defendants designed the franchise agreement so as to obligate and compel their franchise operators to deal solely and only with the supplier defendants.

3. The franchise operators were forbidden to deal in "competitive products," and

4. The operators were required to sell their products to the public at prices fixed by Carvel.

Rephrased in standard antitrust terminology, the complaint apparently alleges, as to the supplier defendants, a boycott under which they declined to make direct sales to the franchise operators. As to the Carvel defendants they are seemingly charged with (1) participation in the conspiratorial boycott against direct sales, (2) requiring, as a condition of obtaining the franchise and purchasing equip-

ment, the use of the supplier defendants' products to the exclusion of the suppliers' competitors (tie-in), (3) forbidding the franchise operators from selling other than Carvel approved products (exclusive dealing), and (4) price fixing. These allegations will be taken up in order following a general discussion of the nature of the Carvel operation.

III. Nature of the Carvel Operation and the Franchise System.

Thomas Carvel, an individual defendant in some of the actions and president of the Carvel Corporation, went into the ice cream business in 1934. Over the succeeding years Mr. Carvel developed a freezer for dispensing "soft" ice cream, an ice cream mixture about the consistency of frozen custard. About 1948 the business established by Mr. Carvel had grown so substantially that two corporations, Carvel Corporation and Carvel Dari-Freeze Stores, Inc., were organized for the purpose of issuing franchises and selling freezers for the operation of soft ice cream stores under the Carvel name.

Thereafter, while the Carvel corporations operated some stores directly, most of their business related to the franchise operation. Each of the plaintiffs entered into agreements for the operation of a franchised Carvel Dari-Freeze ice cream store. The franchise operators conducted their businesses as independent contractors but were subjected to a number of restrictions which tended to create a uniform system of operation.

In some instances the franchisee erected his own store on premises subleased from Carvel. In other cases the franchisee leased a completed store as well as the land. All stores were constructed according to plans and specifications approved by Carvel. The ice cream sold by the

stores is dispensed through certain machines designed by the defendants and bearing the Carvel name or trademark. The ice cream so dispensed is processed from an ice cream mix which the franchisee bought through Carvel from a dairy approved by Carvel. The mix is prepared from a special approved formula which was developed by Carvel and which is kept confidential by the dairies. Under the franchise agreements Carvel receives a royalty of twenty-five cents a gallon on the mix used in the machines.

The plaintiffs' franchise agreements require the franchisees to operate their stores in accordance with a Standard Operating Procedure Manual (SOP). This SOP regulates the business of the operators in a number of respects. It describes the products which the operators may sell at their store, the advertising which they may use, the color they must paint their store, the hours when they must put on their lights, the amount of insurance they must carry, the colors of their employees' uniforms, and many other details. To the public the individual franchise operator appears to be part of a national organization which manufactures and distributes a limited type of products of uniform quality. The Carvel SOP refers to each store as "an integral part of the chain."

There are approximately 400 Carvel Dari-Freeze stores presently in operation, extending from Maine to Florida and as far west as Wisconsin. The stores do an estimated gross business of between six to eight million dollars annually. Carvel's sales to the stores of equipment, ingredients and supplies reached a high of $5,532,396 in 1957 and in 1960 totalled $4,460,689.

The operation of franchise stores, of which Carvel is an example, is a comparatively recent development. Franchise stores differ from the older established chain store operations in which the managers of the stores were not independent operators.

Opinion of Dawson, D. J.

The franchise method of operation has the advantage, from the standpoint of our American system of competitive economy, of enabling numerous groups of individuals with small capital to become entrepreneurs. The franchise business has had a phenomenal growth in the ice cream industry. If our economy had not developed that system of operation these individuals would have turned out to have been merely employees. The franchise system creates a class of independent businessmen; it provides the public with an opportunity to get a uniform product at numerous points of sale from small independent contractors, rather than from employees of a vast chain. The franchise system of operation is therefore good for the economy.

However, the cornerstone of a franchise system must be the trademark or trade name of a product. It is this uniformity of product and control of its quality and distribution which causes the public to turn to franchise stores for the product. This is well illustrated in the Carvel operation. The individual franchise to a dealer permits him to manufacture and sell Carvel ice cream from a store of uniform asd distinctive design that has as an integral structural feature the Carvel crown and cone trademark erected on the roof as a prominent identifying mark. All stores are also identically unique in that they have a flat, slanting roof, the front portion of the building consists only of glass walls and the name "Carvel" is displayed on each side in the form of neon signs over twelve feet in length and nearly three feet high. The building and the distinctive appurtenances thereto are protected by a design patent issued to Thomas Carvel. The ice cream is made and dispensed from a patented machine. Where the ice cream product which is sold to the public is such as would be placed in a paper container the name "Carvel" is written in script on the face of the container. Where it is necessary to provide a spoon with the ice cream product,

as in the case of a sundae, the spoon used is distinctive and unique in design, with the Carvel crown and cone at the end or top of the handle and the name "Carvel" written in distinctive script on the handle of the spoon.

It is this uniformity of stores and operation, and this advertising and the knowledge of the public of the uniformity and quality of the product that draws the business to the Carvel operators. The name Carvel constitutes a trademark of great value to the defendant companies and to the franchise operators.

It is well established that the owner of a trademark may license its use to another without abandoning his trademark. However, a naked license agreement without supervisory control over the product is invalid. *E. I. du Pont de Nemours & Co.* v. *Celanese,* 167 F. 2d 484, at p. 489 (C. C. P. A. 1948). The obligations of the trademark licensor were well expressed in *Morse-Starrett Products Co.* v. *Steccone,* 86 F. Supp. 796, at p. 805 (D. C. N. D. Cal. 1949):

> "* * * If the owner of a trademark wants to license the use thereof to another and still retain as his own the enjoyment of the rights stemming therefrom, he must do so in such a way that he maintains sufficient control over the nature and quality of the finished product, over the activities of the licensee, as will enable the licensor to sustain his original position of guarantor to the public that the goods now bearing the trademark are of the same nature and quality as were the goods bearing the trademark before the licensing, or, that the mark now has the same meaning as far as the public is concerned as it did before the licensing."

The validity of the franchise agreements and the other agreements between Carvel and the operators must be judged in the light of this fundamental rule relating to the protection of trademarks and trade names.

As was stated in *Coca-Cola Co. v. J. G. Butler & Sons*, 229 Fed. 224, 232 (D. C. Ark. 1916):

> "• • • The trademark laws, like the patent laws, give the owner a monopoly which neither the Sherman Act nor any other act of Congress forbids. It would be a paradox to say that the exercise of a right, expressly granted by law, is unlawful."

IV. Liability of the Supplier Defendants

The plaintiffs' case against the supplier defendants rests almost entirely upon the legality of the contracts of the supplier defendants with Carvel. The contracts are not uniform, but certain provisions are common to them, and the general charges made by plaintiffs are the same as respects all the supplier defendants.

The liability of the supplier defendants is predicated upon alleged unlawful conspiracies on the part of each of the supplier defendants with Carvel not to sell direct to the plaintiffs. The plaintiffs do not contend that the supplier defendants engaged in any common conspiracy with Carvel and with each other in furtherance of any illegal end. No evidence of any such conspiracy was offered; the plaintiffs relied on the agreements between Carvel and the supplier defendants to establish the unlawful conspiracies.

The contracts of the two dairy companies involved in this action, H. P. Hood & Sons, Inc. ("Hood") and Rakestraw's Dairy Products, Inc. ("Rakestraw"), are substantially similar. Hood and Rakestraw each agreed to manufacture and sell to Carvel all the "Carvel Mix" required by Carvel dealers located in the respective geographical areas to be serviced by each of them.[4] Carvel

[4] Hood delivered Carvel Mix to the stores of the plaintiffs in Massachusetts and Connecticut and Rakestraw made deliveries to the plaintiffs located in Pennsylvania.

agreed to purchase from the dairies all of its requirements of Carvel Mix for such stores. The supply contracts provided that Hood and Rakestraw should manufacture Carvel Mix according to a secret formula furnished by Carvel and that they would not disclose the formula to any unauthorized persons. In addition, Hood and Rakestraw agreed to "deliver only Carvel Mix to Carvel Stores, and no other ice cream mix or ice cream preparation of any kind." Deliveries of Carvel Mix were made by the dairies direct to the franchise operators.

It is difficult to see exactly what plaintiffs consider to be the illegality of the dairy companies' contractual arrangements with Carvel. The complaint alleges that the supplier defendants violated the antitrust laws by their refusal to deal direct with the plaintiffs. There is no allegation in the complaint that the provisions of the contracts under which the dairies agreed to furnish all of Carvel's requirements for Carvel Mix were illegal in themselves, and the plaintiffs failed to prove that such provisions were in fact illegal. See, *Tampa Electric Co. v. Nashville Coal Co.*, 365 U. S. 320 (1960); *United States v. Columbia Steel*, 334 U. S. 495 (1948).

As to the alleged refusal to deal direct, certainly the plaintiffs had no right to purchase Carvel Mix, made pursuant to Carvel's secret formula, other than on the terms which Carvel prescribed. Carvel had the right to bind the dairy companies to manufacture this secret formula mix solely for its own use or for persons whom it might designate. No outsider or any of the plaintiffs, without Carvel's approval, had the right to require the dairy companies to sell them this special formula mix. This conclusion seems obvious.

The same conclusion applies to the contracts of the two other supplier defendants, Eagle Cone Corporation and

Mohawk Container Co. Eagle Cone Corporation agreed to supply all of Carvel's requirements for certain special ice cream cones for the operators located in New York, Connecticut and Massachusetts. The Mohawk Container Co. contract was an agreement to sell in a six state territory certain paper products of an exclusive design which would be ordered by Carvel. These contracts were not shown to be in any way illegal, still less illegal *per se*. See *Bascom Launder Corp.* v. *Telecoin Corp.*, 204 F. 2d 331 (2d Cir.), *cert. denied*, 345 U. S. 994 (1953).

As a second possible basis for liability, the plaintiffs appear to rely on the fact that the supplier defendants would not sell them ice cream mixes other than the Carvel Mix (in the case of the two dairy companies) or other than Carvel approved merchandise (in the case of the other supplier defendants). As previously mentioned, the Hood-Carvel supply contracts provided that Hood would deliver no ice cream preparation other than Carvel Mix to Carvel stores and the Rakestraw contracts contained similar provisions.[5]

Plaintiffs' argument that these provisions are illegal must fail for several reasons:

First, the argument assumes the illegality of Carvel's restrictions on using only Carvel Mix and other approved products in the franchised stores—an assumption that is rejected in a subsequent section of this opinion.

Secondly, the plaintiffs failed to prove that any of the supplier defendants were asked to make sales of unapproved merchandise and that they refused to do so.

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[5] The contracts of Eagle Cone Corporation and Mohawk Container Co. contained no provision that these companies would not sell the operators non-Carvel approved merchandise and the plaintiffs failed to prove that any such policy existed independent of the contracts.

Thirdly, even if the supplier defendants agreed with Carvel not to sell other than Carvel approved products to the franchise operators, such an agreement by two persons not in competition with each other would not have constituted an illegal boycott. *Packard Motor Car C. v. Webster Motor Car Co.*, 243 F. 2d 418 (D. C. Cir.), *cert. denied*, 355 U. S. 822 (1957); *Schwing Motor Car Co.* v. *Hudson Sales Corp.*, 138 F. Supp. 899 (D. Md.) *aff'd per curiam*, 239 F. 2d 176 (4th Cir. 1956), *cert. denied*, 355 U. S. 823 (1957).

Finally, the plaintiffs made no showing that they could not obtain non-Carvel merchandise from other suppliers or that the refusal of the supplier defendants to sell them such merchandise deprived the plaintiffs of any access to these goods.

In conclusion, plaintiffs' evidence failed to make out any illegal conduct on the part of the supplier defendants and the case against them must therefore be dismissed.

V. Validity of Requiring the Use of the Supplier Defendants' Products to the Exclusion of Others.

In considering the particular violations of the anti-trust laws charged against Carvel, it is necessary to distinguish between the arrangements that Carvel had with its operators prior to May 1, 1955, and the agreements entered into after that period. In 1954 the Federal Trade Commission made an investigation of Carvel's method of conducting its business. No complaint was ever issued and no formal hearings were ever held before the Federal Trade Commission. However, Carvel retained counsel to review the manner of conducting its business operations and, on their advice, it revised its franchise agreements and other documents in a number of respects. Therefore it will be neces-

sary to examine Carvel's method of doing business prior to May 1, 1955, as well as its present method of doing business. The plaintiffs in the Susser, McCoy, Mueller and Frederick cases entered into their franchise agreements prior to May 1, 1955. The plaintiffs in the others cases [6] all entered into their agreements after May 1, 1955.

The complaints allege that the Carvel defendants designed the franchise agreements to compel the franchise operators to deal only with the supplier defendants. The restrictive provision in the franchise agreements entered into prior to May, 1955 was as follows:

> "4. The Operator does hereby agree during the life of this Franchise Contract as follows:
>
> (c) To purchase only Carvel Special Formula Mix from a source of supply designated by Carvel.
>
> (d) To purchase from Carvel all equipment necessary for the operation of the Store at Carvel standard prices and to pay for same on terms as agreed between the parties hereto in separate Sales Contract attached hereto and made part hereof.
>
> (e) To purchase and use only standard Carvel approved printed paper goods, napkins, cones, extracts, spoons, and all other Carvel products at standard market prices."

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[6] Módick, Ossola, Phelan, Pierce, Rodens, Sue, Pazdro and Giberman. (The cases involving the plaintiffs Pierce, Mueller, Frederick and Rodens, which were begun in the Eastern District of Pennsylvania, were consolidated before being transferred to this court. This accounts for the reference to twelve names of plaintiffs in the nine cases covered by this opinion.)

The post-1955 franchise agreements contain the following provisions:

> "SIXTH: In order to safeguard th integrity of the Carvel trade-marks, the Dealer agrees that he will purchase from Carvel or from approved sources designated by Carvel, his entire requirements of Carvel's Frozen Dairy Product mix, toppings, flavorings and other ingredients, cones and any other items sold as a part of the end product that is offered for consumption to the retail purchaser as scheduled in the Standard Operating Procedure Manual * * *.
>
> * * *
>
> NINTH: In connection with the operation of a Carvel Store and to comply with the specifications set forth in the Manual, the Dealer is required to purchase various items of machinery and equipment and paper goods, a list of which is set forth in the Manual. To the extent that Carvel is able to supply the same, the Dealer shall have the right to purchase such machinery, equipment and paper goods, if he so desires, from Carvel, at prices fixed by Carvel from time to time. The Dealer's obligation under this paragraph is satisfied so long as the Dealer equips his store and keeps it maintained in accordance with the specifications contained in the Manual. In the event that the Dealer desires to purchase his printed paper goods from sources other than Carvel, Carvel shall license manufacturers of such products to print the Carvel name thereon in connection with sales to the Dealer, with products made in accordance with Carvel standards."

The first problem to be considered is whether Carvel may lawfully require the franchise operators who purchase

freezers[7] from Carvel "to purchase only Carvel Special Formula Mix from a source of supply designated by Carvel." In this respect the pre-1955 agreements and the post-1955 are substantially similar. The sources of supply which Carvel designated were various dairies, two of which, Hood and Rakestraw, are defendants in these actions. The provision in the franchise agreements which operates to obligate the dealers to purchase Carvel Special Formula Mix from these defendants is attacked by the plaintiffs as an unlawful tie-in under Section 1 of the Sherman Act and Section 3 of the Clayton Act, 15 U. S. C. §§ 1, 14.

It is doubtful whether Section 3 of the Clayton Act is applicable to the kind of restriction here involved. Section 3 prohibits restrictions in sales or leases preventing the use of goods or other commodities of "a competitor or competitors of the lessor or seller." Since Carvel, which has imposed the restriction, does not itself manufacture ice cream mix, it is doubtful whether dairy companies producing ice cream mix can be considered "competitors" of Carvel so as to bring Section 3 into application. However, it is unnecessary to resolve this question since the arrangement here involved is not of the type which could be held illegal under the provisions of either Section 1 of the Sherman Act or Section 3 of the Clayton Act.

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[7] It is not altogether clear in Carvel's arrangements with its operators what the tying device may be considered to be and what product or products are alleged to be tied in. Logically the franchise, which is basic to the entire operation, or the dispensing freezers sold by Carvel, would seem to be the tying articles with the mix and accessory products tied in. Plaintiffs in their post trial brief do not assert that the franchise is a tying device but advance the theory that in addition to the freezers the front assembly plate for the freezers (which happens to be patented and which is leased to the operators) is a tying article. This attempt to bring in an incidental patented article as a tying device as to which "dominance" may be presumed is unrealistic and cannot be accepted. This opinion proceeds on the basis of plaintiffs' other contention that the dispensing freezers sold by Carvel are the tying articles.

The plaintiffs rely on a number of cases in which various tie-in arrangements have been held illegal under the anti-trust laws. It is true that "tying agreements fare harshly under the laws forbidding restraint of trade." *Times-Picayune Publishing Co.* v. *United States*, 345 U. S. 594, 606 (1953). The following cases illustrate types of tie-ins which have been condemned. *United Shoe Machinery Corp.* v. *United States*, 258 U. S. 451 (1922) (lease of patented machines on condition that leased machinery should not be used with shoes upon which certain other operations had not been performed on other machines of the lessor and on condition that lessee should purchase supplies exclusively from the lessor); *International Business Machines Corp.* v. *United States*, 298 U. S. 131 (1936) (lease of patented tabulating machines on condition that lessees should use with such machines only patented tabulating cards also manufactured by the lessor); *Mercoid Corp.* v. *Mid-Continent Investment Co.*, 320 U. S. 661 (1944) (use of patent license to tie in unpatented elements); *International Salt* v. *United States*, 332 U. S. 392 (1947) (lease of patented salt machines on condition that all salt consumed in the machines be purchased from lessor); *Northern Pacific Ry. Co.* v. *United States*, 356 U. S. 1 (1958) (sale of land with preferential routing conditions); *United States* v. *General Motors Corp.*, 121 F. 2d 376 (7th Cir. 1941) (requiring purchasers to deal with finance companies controlled by the automobile manufacturer).

The plaintiffs are unable to bring themselves under these cases for a number of reasons.

First of all, none of the cases in which tie-ins were held illegal involved the sale of products to the public under the trademark of the person imposing the restriction. The right of the franchisees to use the Carvel trademark was undoubtedly a valuable property right which, because it had been extensively advertised, and was associated with a particular product, had generated considerable good will. It is well settled that the licensor of a trademark not only

is justified in imposing restrictions on his licensee but, indeed, is obligated to do so in order to make the license a valid one. See, *e.g., Arthur Murray, Inc.* v. *Horst,* 110 F. Supp. 678 (D. Mass. 1953) (license to use name "Arthur Murray" conditioned upon agreement to employ only dancing instructors trained in the "Arthur Murray method"). In *The Coca-Cola Bottling Co.* v. *The Coca-Cola Co.,* 269 Fed. 796 (D. Del. 1920) it was held that an agreement to buy Coca-Cola syrup exclusively from the manufacturer mark, not to sell substitute or imitation products, was not violative of the Clayton or Sherman acts.

The rationale of these latter cases applies here. Carvel, which had developed a secret formula for ice cream mix, was justified in requiring the operators to use this mix in making sales to the public under the Carvel name. The end product which was sold to the public *was Carvel ice cream,* and it was this product to which the Carvel trademark and good will attached. The restrictions imposed by Carvel fall within the permissible limits approved in *FTC* v. *Sinclair Refining Co.,* 261 U. S. 463 (1923). In that case Sinclair, a refiner of gasoline, leased underground tanks and gasoline pumps to retail dealers on the condition that the equipment should be used only with gasoline supplied by the lessor. The Supreme Court held that no violation of the Clayton Act was involved.[8]

In *Times Picayune Publishing Co.* v. *United States,* 345 U. S. 594, 607 (1953), the Court explained the significance of the *Sinclair* case by pointing out that there "the arrangement merely prevented lessees from dispensing other types of gasoline through the lessor's brand pumps and was thus viewed as a means of protecting the good-will of the lessor's branded gas." On the authority of the *Sinclair* case it is

[8] See Standard Oil Co. v. FTC, 273 Fed. 478, at 481 (2d Cir. 1921)—"It is unfair and dishonest to give out from a pump bearing one brand another maker's oil. * * *."

clear that Carvel has the legitimate right to require that only its special formula mix be dispensed from the machines and equipment sold to the franchise operators which bear the Carvel trademark. See also *Pick Mfg. Co.* v. *General Motors Corp.*, 80 F. 2d 641 (7th Cir. 1935), *aff'd per curiam*, 299 U. S. 3 (1936), in which a contract of an automobile manufacturer with a dealer that the dealer would not sell or use in the repair of any of the manufacturer's vehicles any part not manufactured or authorized by the automobile manufacturer was held not to violate the antitrust laws.

As regards the accessory products such as toppings, cones and paper goods, these products are so closely related to the ice cream mix that Carvel is entitled to designate approved sources of supply as the franchise agreements provide. To require Carvel to limit itself to advance specifications of standards for all the various types of accessory products used in connection with the mix would impose an impractical and unreasonable burden of formulation and policing and is not required by the antitrust laws. It is to be noted however that the agreements indicate that Carvel would approve the use of accessory supplies from alternate sources of supply if an adequate check on standards could be maintained. In this there is no violation. See *Standard Oil Co. of California* v. *United States*, 337 U. S. 293, 306 (1949). There was no indication that Carvel reaped any profit itself from any of the tie-ins.

In any event, it is plain that the restraints in the nature of tie-ins which are attacked by the plaintiffs cannot be declared *per se* illegal, which is the only type of illegality on which the plaintiffs rely. The extent to which tie-ins may be regarded as *per se* illegal under the antitrust laws is far from clear. See Turner, "Validity of Tying Arrangements Under the Antitrust Laws," 72 Harv. L. Rev. 50-75 (1958). Certainly in this case no *per se* illegality was demonstrated. The plaintiffs made no showing, as ordinarily required under the cases, that Carvel occupies a dominant position as a franchisor of soft ice cream or seller of ice cream

freezers, or even that a substantial amount of commerce in the "tied" products was foreclosed. In the absence of these facts there is no basis for recovery. *Times-Picayune Publishing Co.* v. *United States*, 345 U. S. 594 (1953).

VI. Prohibition of Sale of Non-Carvel Products.

The franchise agreements entered into prior to May 1955 provided in Paragraph 4 that the operator agreed

> "(a) To maintain, conduct and operate a Carvel Store at the premises hereinafter mentioned conforming in all respects to the Carvel Methods, Operating Techniques and Standards and to sell therein only frozen dairy products established as standard products in Carvel Stores. All operating techniques and standards shall be subject to change by Carvel upon notice to Operator.
>
> (b) That all merchandise purchased in said Store shall be under the Carvel label, established as such by Carvel, and Operator is to refrain from selling or dealing in any other products unless otherwise designated by Carvel."

The franchise agreements entered into after May 1955 provide that

> "The Dealer agrees to sell at the Carvel Store, Carvel's Frozen Dairy Product solely in accordance with the (Standard Operating Procedure) Manual and will sell no other product except as hereinafter expressly otherwise provided."[9]

The allegation that the franchise operators are prohibited by the foregoing provisions from dealing in other than Carvel products on their store premises presents a

[9] Both forms of franchise agreement permitted the operator to install one soft drink cup, dispensing machine and one cigarette vending machine at the outside of the store only.

separate problem from that of tie-ins, although such "exclusive dealing" involves related issues and has also been attacked under Section 3 of the Clayton Act as well as other antitrust laws.[10] There is no dispute that Carvel enforced the exclusive dealing provisions by notifying certain of the franchise operators to discontinue selling unauthorized merchandise and, in a few instances, brought suits to enjoin such violations of the franchise agreements.

Any consideration of the legality of Carvel's exclusive dealing arrangements with the franchise operators must involve an appraisal of the effect of the decision in the *Standard Stations* case, *Standard Oil Co. of Calif.* v. *United States*, 337 U. S. 293 (1949). The contracts involved in that case required the dealer to purchase from Standard all his requirements of one or more products, and in the fields which they covered, petroleum products and accessories, competitors were effectively excluded. These arrangements were held illegal.

There are several facts here which distinguish the position of the Carvel franchise operators from that of the dealers involved in the *Standard Stations* case. A distinction must be drawn first of all between the requirement that the franchise operators not sell competing brands of ice cream and the prohibition that the franchise operators not sell other types of products, such as hamburgers and coffee, completely outside the competitive ice cream line. The latter type of restriction was not involved in the *Standard Stations* case, nor could such a restriction be held illegal under Section 3 of the Clayton Act since there is no

[10] As with tie-ins, a number of cases have held certain kinds of exclusive dealing arrangements to be illegal. Standard Fashion Co. v. Magrane-Houston Co., 258 U. S. 346 (1922) (agreement requiring purchaser of dress patterns not to deal in patterns of the seller's competitor); FTC v. Motion Picture Advertising Service Co., 344 U. S. 392 (1953) (contract prohibiting showing of competitors' films); Dictograph Products v. FTC, 217 F. 2d 821 (2d Cir. 1954), cert. denied, 349 U. S. 940 (1955) (restricting hearing aid dealers from selling products of competitors).

competition between Carvel's products and products outside the ice cream field. Section 3 of the Clayton Act prevents a seller or lessor from prohibiting his purchaser or lessee from dealing in the goods of "a competitor or competitors of the lessor or seller," but this prohibition is not applicable to Carvel's restriction on the sale of goods outside the ice cream line since Carvel is not competing with such goods.

No case has been found under any of the antitrust laws holding that the franchisor of a valuable trademark cannot restrict the line of the business operated by his franchisee. Carvel is in the business of franchising ice cream dealers and should not be forced by the operators to enter into or lend its name to other lines of business. Naturally any food products sold on the premises in a store of uniform specifications and displaying the Carvel sign would be attributed to Carvel. Any defects in quality, over which Carvel would have no control, would detract from the Carvel name and good will. Carvel is not, by these restrictions, taking any business for itself at the expense of its competitors and no injury to competition is shown.

The problem of whether the dealers may lawfully be prohibited from selling ice cream products which compete with the Carvel line is a closer question, in view of the decision in *Standard Stations,* but even here there are reasons why Carvel's restrictions should be sustained. The factual situation involved here is different from that in *Standard Stations* where the agreements "contained provisions which, both by the language used and the limitations of liability, stressed the character of the agreement as seeking to establish the dealer as an independent contractor." *United States* v. *Standard Oil Co.*, 78 F. Supp. 850, 855 (S. D. Calif. 1948) *aff'd*, 337 U. S. 293 (1949). The dealers were little more than the wholesale purchasers of Standard's products and they were not part of a closely controlled franchise operation where the operators function in many respects as an integral part of the entire Carvel operation. Standard Oil's method of operation was to

sell its own products to its dealers, but the ice cream mix and accessory products which, as a technical matter, are sold through Carvel, are not produced by Carvel. Carvel is in the business of franchising stores; it is not in the business of manufacturing ice cream mix, cones or napkins. The exclusive dealing provisions as to these products are aimed primarily at control of quality and are not part of a design by Carvel to monopolize business in any of these fields. Under these circumstances the exclusive dealing provisions in Carvel's franchise agreements are not violative of the antitrust laws. See, *Pick Mfg. Co.* v. *General Motors Corp.*, 80 F. 2d 641 (7th Cir. 1935), *aff'd per curiam*, 299 U. S. 3 (1936); *Boro Hall Corp.* v. *General Motors Corp.*, 124 F. 2d 822 (2d Cir. 1942); *cf.*, *Arthur Murray, Inc.* v. *Horst*, 110 F. Supp. 678 (D. Mass. 1953).

As a practical matter, it may be noted that there is no evidence that the Carvel operators are particularly interested in selling other kinds of ice cream. The testimony that was given during the trial of the fraud aspect of these cases indicated that the operators were more concerned with expanding their line of business into other fields than with selling additional brands of ice cream.[11]

In any event, since the plaintiffs have voluntarily limited themselves to *per se* violations, they cannot succeed in their attack upon the exclusive dealing provisions in the franchise agreements. It is plain that exclusive dealing provisions, although they may be illegal under certain circumstances, are not illegal *per se*. *Bascom Launder Corp.* v. *Telecoin Corp.*, 204 F. 2d 331 (2d Cir.), *cert. denied*, 345 U. S. 994 (1953). They can only be held illegal if, within a relevant market, they substantially lessen competition. The plaintiffs, presumably in accordance with their *per se* theory of illegality, offered no evidence as to the

[11] One complained of his inability to sell hamburgers; one complained that he could not use the premises to sell Christmas trees.

relevant market nor did they show that competition was substantially lessened. On this record the plaintiffs have not made out a case for relief.

VII. Validity of Pricing Provisions in the Franchise Agreements

The challenged pricing clause in the franchise agreements used *prior to May 1955* required the operator "to maintain prices on products designated in, and as per Carvel Standard Operating Procedure and not to conduct any reduced price sales of these items without written consent from Carvel." Section "J" of the pre-1955 SOP provided for certain stated "standard selling prices" which were established by Carvel. Section "K" of the early SOP, entitled "General Information," contained the following sentence: "In the event that you plan a special sale or promotion other than those planned by your company, it is necessary to secure permission to sell merchandise at a price below the standard permitted." These provisions show clearly that the prices at which ice cream was sold to the public were set by Carvel and not by the operators.

It has been established beyond any possibility of dispute that agreements fixing prices are illegal *per se* under Section 1 of the Sherman Act. *Dr. Miles Medical Co.* v. *John D. Parke & Sons Co.*, 220 U. S. 373 (1911); *United States* v. *Trenton Potteries Co.*, 273 U. S. 392 (1927). "Where such restraints are established, in purpose or in effect, inquiry under the Rule of Reason ends." *Report of the Attorney General's National Committee to Study the Antitrust Laws*, 12 (1955).

The facts of the present case afford no basis for approval of Carvel's policies under the doctrine of *United States* v. *Colgate & Co.*, 250 U. S. 300 (1919), since here there is no unilateral refusal to deal but a direct agreement between the defendant and its franchisees setting the prices at

which ice cream products may be sold. The defendants do not attempt to justify their agreements under state or federal fair trade laws; presumably because they recognize that no "resale" product is involved.

Carvel does urge that its pre-1955 price restrictions on its franchisees should be upheld as ancillary to the license of its trademark and the lease of the patented front plate for the dispensing machine. The contention is made that the price agreements should be sustained by extension of the principle announced in *United States* v. *General Electric Co.*, 272 U. S. 476 (1926), where it was held that a patentee who grants a license to make, use and sell the patented articles might fix the sales price "provided the conditions of sale are normally and reasonably adapted to secure pecuniary reward for the patentee's monopoly." 272 U. S. 476, 490. The defendant relies for authority on *Straight Side Basket Corp.* v. *Webster Basket Co.*, 82 F. 2d 245 (2d Cir. 1936) to support the extension.

In the present state of antitrust law the defendant is unable to justify its actions under those cases. Insofar as the *Webster* case extended the principle of the *General Electric* case to permit prior fixing of unpatented products of a patented machine it must probably be regarded as unsound. *Darber-Colman* v. *National Tool Co.*, 136 F. 2d 339 (6th Cir. 1943); *Cummer-Graham Co.* v. *Straight Side Basket Corp.*, 142 F. 2d 646 (5th Cir. 1944); *American Equip. Co.* v. *Tuthill Bld'g Mat'l Co.*, 69 F. 2d 406 (7th Cir. 1934). Indeed, the *General Electric* doctrine itself is of such uncertain continuing validity that any extension of it at this time must be regarded as unwarranted. See *United States* v. *Line Material Co.*, 333 U. S. 287 (1948). The fact that the ice cream mix may have been made with a secret formula is of no consequence. *Dr. Miles Medical Co.* v. *John D. Parke & Sons Co.*, 220 U. S. 373 (1911).

The cases outlawing price fixing have been so sweeping that there would appear to be room for saying that even in as closely controlled a franchise situation as Carvel maintains, price fixing may be justified as ancillary to a valid business operation. While variable prices in different stores might conceivably jeopardize Carvel's good will and trademark interests, it is plain that absent any claim of statutory protection under the fair trade laws the price fixing provisions in the pre-1955 agreements must, under well-established case law, be held illegal. The fact that in 1955 Carvel radically changed these provisions of its agreements, presumably on the advice of counsel following the FTC investigation, shows that Carvel itself recognized the dubious status of these provisions.

The revised "Dealer's Franchise Agreement," which was adopted by Carvel *after May, 1955* and is still being used (with minor changes not here relevant), contains altogether different price provisions from the earlier agreements. Paragraph Eighth provides as follows:

> "The Dealer shall have the right to sell Carvel's Frozen Dairy Product and/or other items authorized for sale by him under the terms of this agreement at any price that the Dealer determines. Wherever Carvel recommends a retail price, such recommendation is based upon Carvel's experience concerning all factors that enter into a proper price, but such recommendation is in no manner binding upon the Dealer."

The revised SOP for the post-1955 period changed the reference in the earlier manual from "standard selling price" to "recommended selling price."

Section "K" of the SOP which prior to May 1955 contained a provision that it was "necessary" on special sales

to secure permission to sell at other than standard prices, was changed to read:

> "In the event that you plan a special sale or promotion other than those planned by your company, it is suggested that you secure permission to sell merchandise at a price below the standard permitted."

By letter dated February 27, 1956, the operators with agreements signed prior to May 1955 [12] were formally notified of Carvel's changes in pricing policy. The letter, in relevant part, read as follows:

> "All references in your agreement and/or the Standard Operating Procedure to the retail prices of Carvel's Frozen Dairy Products, in its various forms, are deemed to be references to *recommended* prices only. These prices are based upon your company's considerable experience, and the sincere conviction that the price so recommended is both acceptable to the public, and profitable to your operation. However, you are entirely at liberty to vary these prices if you so desire and we disclaim any intention to control your retail prices."

There was no evidence that after February 27, 1956 Carvel imposed on any of the franchise operators any duty to maintain given prices. In fact in this later period Carvel prepared advertising signs and posters in which prices were left blank, or on which stickers could be pasted with various prices selected by the operators. Certain correspondence which was introduced in evidence also supported the fact

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[12] The plaintiffs in the Susser, McCoy, Mueller and Frederick cases are in this category. (Although the date of the plaintiff Rodens' franchise agreement is April 11, 1955, the form of the agreement is that which was stipulated to have been used by Carvel after May 1, 1955.)

that Carvel had abandoned its earlier price maintenance policy. One of the plaintiffs' own items of evidence, a letter from Carvel dated September 3, 1957, which went out to all operators stated: "Our supply department has blank signs to use should you care to increase or decrease your prices."

There is no convincing evidence that the dealers do not presently have the right to fix their own sale prices to the public without penalty by Carvel. In the absence of any attempt by Carvel to impose a binding price structure, the fact that Carvel announced a schedule of suggested prices is not illegal. See *Maple Flooring Mfrs. Ass'n* v. *United States*, 268 U. S. 563 (1925); *Cement Mfrs. Ass'n* v. *United States*, 268 U. S. 588 (1925).

In conclusion, the price fixing provisions in the franchise agreements between Carvel and the plaintiffs in the Susser, McCoy, Mueller and Frederick cases were illegal and the illegality in each case extended from the dates on which the respective agreements were signed [13] until Carvel formally released the operators from such price fixing provisions on February 27, 1956. Damages for such periods of illegality may be recovered to the extent proved in these four cases in a subsequent trial, subject to the application of the statute of limitations as subsequently discussed. The plaintiffs in the other cases have no cause of action for illegal price fixing since they entered into their agreements after May 1, 1955 and there was no proof that Carvel ever compelled such operators to maintain fixed prices.

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[13] The relevant dates in these four cases are as follows:

Plaintiff	*Date of Franchise*
Susser	7/17/54
McCoy	10/30/54
Mueller	2/24/54
Frederick	2/11/53

VIII. General Defenses Raised by Carvel.

A. *Alleged Lack of Federal Jurisdiction*

Carvel, as a general defense to all claims against it, asserts that federal jurisdiction is lacking because the restraints relied on by the plaintiffs do not involve, directly affect, or substantially obstruct interstate commerce.[14]

It is not disputed that Carvel itself is engaged in interstate commerce. Indeed it could hardly be argued otherwise, considering the fact that Carvel is engaged in the business of franchising stores and selling equipment in at least six states and that approximately 400 stores are in operation in these states under the Carvel name.

Carvel urges, however, that the plaintiffs are not engaged in interstate commerce and, since the restraints under attack apply to the operators' businesses, no basis for federal jurisdiction exists. The argument states that even if some of the materials which the operators use moves to them in interstate commerce such materials come to rest at the retailer's establishment, and are thereafter manufactured and transformed into the finished products which are sold to the public in purely intrastate transactions. See *Page* v. *Work*, 290 F. 2d 323 (9th Cir. 1961); *Brosius* v. *Pepsi-Cola Co.*, 155 F. 2d 99 (3d Cir. 1945).

Whatever might be the validity of the defendants' argument if the restrictions involved were imposed on an isolated dealer, it is clear that where they form part of Carvel's general policy of conducting its business, interstate commerce is so affected as to give this Court jurisdiction. The restrictions pertain not merely to the way in which the plaintiffs conduct their business but also to the way in which Carvel conducts its business. In this light it is obvious that the requisite effect on interstate commerce is present. See

[14] None of the supplier defendants rely on this defense.

United States v. *Rock Royal Co-Operative, Inc.*, 307 U. S. 533, 568-69 (1939); *United States* v. *Standard Oil Co.*, 78 F. Supp. 850, 864-5 (S. D. Calif. 1948), *aff'd* 337 U. S. 293 (1949).

B. *Defense of the Statute of Limitations*

Section 15b of Title 15, U. S. C., provides that private treble damage suits are barred "unless commenced within four years after the cause of action accrued." Since the alleged violations on which the plaintiffs rely resulted from certain restrictive provisions in their franchise agreements, their cause of action first accrued at the time when the agreements were signed. If the plaintiffs' causes of action "accrued" for all purposes within the meaning of 15 U. S. C. § 15b at the date of the franchise agreements, then the plaintiffs in the Susser, McCoy, Phelan, Frederick, Mueller and Giberman cases would be barred from maintaining this suit because their actions were not commenced until more than four years after they entered into their franchise agreements.[15] However, as the plaintiffs point out, the defendants' actions were part of a continuing policy of doing business and the plaintiffs are entitled to recover for such unlawful practices as occurred within the four years preceding the filing of their complaint. *Cardinal Films, Inc.* v. *Republic Pictures Corp.*, 148 F. Supp. 156 (S. D. N. Y. 1957).[16]

The only violation of the antitrust laws which the plaintiffs have proven relates to the price fixing which took place under the old franchise agreements. The only parties to these agreements who are plaintiffs here are in the Susser,

[15] See Fleischer v. A. A. P., Inc., 180 F. Supp. 717 (S. D. N. Y. 1959).

[16] See Momand v. Universal Film Exchanges, 172 F. 2d 37, 49 (1st Cir. 1948).

McCoy, Mueller and Frederick cases. The other plaintiffs all signed franchise agreements embodying the current Carvel pricing policy which is not in violation of the antitrust laws. The parties to the earlier agreements were not shown to have been notified that Carvel no longer required them to maintain fixed prices until February 27, 1956. Therefore the parties to the old franchise agreements were presumably contractually obligated to maintain prices until February 27, 1956, at which time Carvel formally notified them of its change of policy. The complaints in the Susser, McCoy, Mueller and Frederick cases were all filed within four years of this date and they may therefore recover damages for the periods indicated below:

Plaintiff	Date of Franchise	Date Action Commenced	Period of Price Fixing for Which Damages May Be Recovered
Susser	7/17/54	9/11/59	9/11/55 to 2/27/56
McCoy	10/30/54	10/28/59	10/28/55 to 2/27/56
Mueller	2/24/54	9/ 5/58	9/ 5/54 to 2/27/56
Frederick	2/11/53	9/ 5/58	9/ 5/54 to 2/27/56

IX. Conclusions.

1. The action of the plaintiffs against the supplier defendants must be dismissed since the plaintiffs failed to prove that the supplier defendants participated in any illegal conspiratorial boycott against direct sales as alleged or that they engaged in any other violations of the antitrust laws.

2. The plaintiffs failed to show that the requirement imposed by Carvel that the plaintiffs use the supplier defendants' products or products approved by Carvel was an illegal tie-in or a violation of the antitrust laws in any respect.

3. The plaintiffs failed to prove that the restriction against selling other than Carvel approved products on plaintiffs' premises was an illegal form of exclusive dealing or violated the antitrust laws in any respect.

4. The price restrictions imposed by Carvel on the plaintiffs who signed their agreements prior to May 1, 1955 were illegal and the plaintiffs in the Susser, McCoy, Mueller and Frederick cases are entitled to a trial on the issue of damages; all other causes of action of these plaintiffs should be dismissed for failure of proof.

5. The actions of the plaintiffs in the Modick, Ossola, Phelan, Pierce, Rodens, Seu, Pazdro and Giberman cases should be dismissed in their entirety for failure of proof.[17]

X. Judgments to Be Entered.

1. Judgment shall be entered dismissing the actions against the following supplier defendants: Eagle Cone Corporation, H. P. Hood & Sons, Inc., Mohawk Container Company, Inc. and Rakestraw's Dairy Products, Inc.

2. Judgments shall be entered dismissing the actions of the plaintiffs against the individual defendants named in the complaints.

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[17] It may be noted that although franchise agreements of the type involved in this case have seldom figured in antitrust opinions, the general legal conclusions arrived at in this opinion regarding the legality of Carvel's method of conducting its business operations are supported by the recent unreported decision of the United States District Court for the District of Kansas in the case of Englbrecht v. Dairy Queen Company of Mexico, Missouri (No. W-1772 Civil—decided April 12, 1962). That case, which involved franchise agreements closely analogous to those at issue here, held that the provisions in those agreements were not in violation of the antitrust laws. In addition, the court there found that the defendant did not fix the prices at which Dairy Queen products were sold to the public.

3. Judgment shall be entered dismissing the actions of Lester N. Modick and Harriet M. Modick, of James Ossola and Elizabeth G. Ossola, or Joseph P. Phelan, of James P. Pierce and Rita Pierce and Sol Rodens, of Matthew Seu and Jane L. Seu, of Paul S. Giberman and Gertrude Giberman, and of Joseph Pazdro and Yolanda Pazdro.

In accordance with Rule 54(b) the Court directs that final judgments may be entered as to all of the causes of action hereinabove referred to. The Court finds there is no good reason for delay in the entry of such judgments.

Plaintiffs in the Susser, McCoy, Mueller and Frederick cases shall be entitled to a trial on the issue of damages arising out of any restrictions imposed by Carvel on prices to be charged by said plaintiffs for the periods beginning within four years prior to the filing of the complaints and running up to February 27, 1956; such trial to be set at the early convenience of the Court.

Let judgments be entered accordingly.

This opinion shall constitute the findings of fact and conclusions of law of the Court.

Dated: New York, N. Y.
June 7, 1962.

ARCHIE O. DAWSON,
U. S. D. J.

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No. 355

Civil File No. 150-212

BERNARD SUSSER, GERTRUDE SUSSER and SHIRLEY SCHWARTZ, *Plaintiffs-Appellants,*

against

CARVEL CORPORATION, CARVEL DARI-FREEZE STORES, INC., CARVEL STORES REALTY CORPORATION, EAGLE CONE CORPORATION, H. P. HOOD & SONS, *Defendants-Appellees.*

Civil File No. 152-119

LESTER N. MODICK and HARRIET M. MODICK, *Plaintiffs-Appellants,*

against

CARVEL STORES OF NEW YORK, INC., CARVEL CORPORATION, CARVEL DARI-FREEZE STORES, INC., EAGLE CONE CORPORATION, H. P. HOOD & SONS, *Defendants-Appellees.*

Civil File No. 152-120

MARTHA M. McCOY and FRANK T. McCOY, *Plaintiffs-Appellants,*

against

CARVEL CORPORATION, CARVEL DARI-FREEZE STORES, INC., CARVEL STORES REALTY CORPORATION, EAGLE CONE CORPORATION, H. P. HOOD & SONS, *Defendants-Appellees.*

Civil File No. 153-193

JAMES OSSOLA and ELIZABETH G. OSSOLA, *Plaintiffs-Appellants,*

against

CARVEL STORES OF NEW YORK, INC., CARVEL DARI-FREEZE STORES, INC., CARVEL STORES REALTY CORPORATION, EAGLE CONE CORPORATION, H. P. HOOD & SONS, *Defendants-Appellees.*

Civil File No. 153-194

JOSEPH P. PHELAN, *Plaintiff-Appellant,*

against

CARVEL STORES OF NEW YORK, INC., CARVEL DARI-FREEZE STORES, INC., CARVEL STORES REALTY CORPORATION, EAGLE CONE CORPORATION, H. P. HOOD & SONS, *Defendants-Appellees.*

(Continued on Reverse Side of Cover)

Civil File No. 60 Civil 63

JAMES P. PIERCE, RITA PIERCE, LYLE FREDERICK, LEROY M. FREDERICK, ALFRED MUELLER and SOL RODENS, *Plaintiffs-Appellants,*

against

CARVEL STORES OF NEW YORK, INC., CARVEL DARI-FREEZE STORES, INC., CARVEL CORPORATION, CARVEL STORES OF PENNSYLVANIA, INC., CHAIN LOCATIONS OF AMERICA, INC., RAKESTRAW'S DAIRY PRODUCTS, INC., *Defendants-Appellees.*

Civil File No. 60 Civil 1096

MATTHEW SEU and JANE L. SEU, *Plaintiffs-Appellants,*

against

CARVEL CORPORATION, CARVEL STORES OF NEW YORK, INC., CARVEL DARI-FREEZE STORES, INC., CARVEL STORES REALTY CORPORATION, EAGLE CONE CORPORATION, H. P. HOOD & SONS, *Defendants-Appellees.*

Civil File No. 60 Civil 1990

PAUL S. GIBERMAN and GERTRUDE GIBERMAN, *Plaintiffs-Appellants,*

against

CARVEL STORES OF NEW YORK, INC., CARVEL DARI-FREEZE STORES, INC., CARVEHICLE CORP., CARVEL CORPORATION, CARVEL STORES OF PENNSYLVANIA, INC., CHAIN LOCATIONS OF AMERICA, INC., RAKESTRAW'S DAIRY PRODUCTS, INC., *Defendants-Appellees.*

Civil File No. 60 Civil 2042

JOSEPH PAZDRO and YOLANDA PAZDRO, *Plaintiffs-Appellants,*

against

CARVEL STORES OF NEW YORK, INC., CARVEL DARI-FREEZE STORES, INC., CARVEL CORPORATION, CARVEL STORES OF PENNSYLVANIA, INC., CHAIN LOCATIONS OF AMERICA, INC., RAKESTRAW'S DAIRY PRODUCTS, INC., *Defendants-Appellees.*

BRIEF OF RESPONDENT EAGLE CONE CORPORATION IN OPPOSITION TO CERTIORARI.

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Supreme Court of the United States

OCTOBER TERM, 1964.

No.

Civil File No. 150-212

BERNARD SUSSER, GERTRUDE SUSSER and SHIRLEY SCHWARTZ, *Plaintiffs-Appellants,*

against

CARVEL CORPORATION, CARVEL DARI-FREEZE STORES, INC., CARVEL STORES REALTY CORPORATION, EAGLE CONE CORPORATION, H. P. HOOD & SONS, *Defendants-Appellees.*

Civil File No. 152-119

LESTER N. MODICK and HARRIET M. MODICK, *Plaintiffs-Appellants,*

against

CARVEL STORES OF NEW YORK, INC., CARVEL CORPORATION, CARVEL DARI-FREEZE STORES, INC., EAGLE CONE CORPORATION, H. P. HOOD & SONS, *Defendants-Appellees.*

Civil File No. 152-120

MARTHA M. McCOY and FRANK T. McCOY, *Plaintiffs-Appellants,*

against

CARVEL CORPORATION, CARVEL DARI-FREEZE STORES, INC., CARVEL STORES REALTY CORPORATION, EAGLE CONE CORPORATION, H. P. HOOD & SONS, *Defendants-Appellees.*

Civil File No. 153-193

JAMES OSSOLA and ELIZABETH G. OSSOLA, *Plaintiffs-Appellants,*

against

CARVEL STORES OF NEW YORK, INC., CARVEL DARI-FREEZE STORES, INC., CARVEL STORES REALTY CORPORATION, EAGLE CONE CORPORATION, H. P. HOOD & SONS, *Defendants-Appellees.*

Civil File No. 153-194

JOSEPH P. PHELAN, *Plaintiff-Appellant,*

against

CARVEL STORES OF NEW YORK, INC., CARVEL DARI-FREEZE STORES, INC., CARVEL STORES REALTY CORPORATION, EAGLE CONE CORPORATION, H. P. HOOD & SONS, *Defendants-Appellees.*

Civil File No. 60 Civil 63

JAMES P. PIERCE, RITA PIERCE, LYLE FREDERICK, LEROY M. FREDERICK, ALFRED MUELLER and SOL RODENS, *Plaintiffs-Appellants,*

against

CARVEL STORES OF NEW YORK, INC., CARVEL DARI-FREEZE STORES, INC., CARVEL CORPORATION, CARVEL STORES OF PENNSYLVANIA, INC., CHAIN LOCATIONS OF AMERICA, INC., RAKESTRAW'S DAIRY PRODUCTS, INC., *Defendants-Appellees.*

Civil File No. 60 Civil 1096

MATTHEW SEU and JANE L. SEU, *Plaintiffs-Appellants,*

against

CARVEL CORPORATION, CARVEL STORES OF NEW YORK, INC., CARVEL DARI-FREEZE STORES, INC., CARVEL STORES REALTY CORPORATION, EAGLE CONE CORPORATION, H. P. HOOD & SONS, *Defendants-Appellees.*

Civil File No. 60 Civil 1990

PAUL S. GIBERMAN and GERTRUDE GIBERMAN, *Plaintiffs-Appellants,*

against

CARVEL STORES OF NEW YORK, INC., CARVEL DARI-FREEZE STORES, INC., CARVEHICLE CORP., CARVEL CORPORATION, CARVEL STORES OF PENNSYLVANIA, INC., CHAIN LOCATIONS OF AMERICA, INC., RAKESTRAW'S DAIRY PRODUCTS, INC., *Defendants-Appellees.*

Civil File No. 60 Civil 2042

JOSEPH PAZDRO and YOLANDA PAZDRO, *Plaintiffs-Appellants,*

against

CARVEL STORES OF NEW YORK, INC., CARVEL DARI-FREEZE STORES, INC., CARVEL CORPORATION, CARVEL STORES OF PENNSYLVANIA, INC., CHAIN LOCATIONS OF AMERICA, INC., RAKESTRAW'S DAIRY PRODUCTS, INC., *Defendants-Appellees.*

BRIEF OF RESPONDENT EAGLE CONE CORPORATION IN OPPOSITION TO CERTIORARI.

Statement.

The complaint alleged that the antitrust laws were violated not only by the Carvel franchise system but by the several contracts between Carvel and the supplier defend-

ants, including Eagle Cone Corporation. It charged that by such agreements the supplier defendants refused to sell their products to the franchised dealers; and also that there was a conspiracy among all the defendants to establish an unlawful combination (Eagle Brief in Court of Appeals, p. 3).

The trial judge found that no evidence of any such conspiracy was offered (A-37). He held the contracts with the suppliers valid as exclusive dealing agreements, under the authority of *Tampa Electric Co.* v. *Nashville Coal Co.*, 365 U. S. 320 and *United States* v. *Columbia Steel*, 334 U. S. 495 (A-38). He found that even if by such contracts the supplier defendants agreed not to sell other than Carvel approved products to the franchised dealers, that would not constitute an illegal boycott since the defendants were not in competition with each other (A-40).

The Court of Appeals also upheld the validity of the supplier agreements under the authority of *Tampa Electric Co.* v. *Nashville Coal Co.*, 365 U. S. 320; *Bascom Launder Corp.* v. *Telecoin Corp.* (2 Cir.), 204 F2 331, and *Packard Motor Car Co.* v. *Webster Motor Car Co.*, 243 F2 418 (D. C. Cir.), cert. den., 355 U. S. 822 (A-18-22).

The petition for certiorari does not point to any legal error in the conclusions reached by said courts, but merely presents to this Court the question of whether said agreements violate the Sherman Act (Petition, p. 3). In view of the settled law sustaining the validity of exclusive dealing contracts, no review of said question should be granted. The validity of the franchise agreement is a matter which concerns only Carvel and its dealers. It is therefore submitted that the dismissal of the complaint as against Eagle Cone Corporation should be held final and not be subjected to further needless review.

POINT 1.

The petition fails to disclose any grounds justifying a review by the Supreme Court.

At page 7 of the Petition, five grounds for review are listed, none of which is a ground recognized by Rule 19 of the Supreme Court Rules.

While franchise systems as such may not have been the subject of a Supreme Court decision, the decisions of the District Court and of the Court of Appeals applied to the issues of this case the doctrines which this Court has promulgated for all commercial activities. Judge Dawson, after summarizing the allegations of the complaint, proceeded to rephrase them "in standard antitrust terminology" (A-32). Both decisions are standard antitrust decisions which present no novel questions of federal law arising from the fact that Carvel was a franchise system.

The decisions of both the District Court and of the Court of Appeals are entirely consistent with the relevant decisions of the Supreme Court (A-10, 11, 18, 23, 24, 25, 26, 28, 36, 38, 44, 45, 46, 47, 48, 55). Said decisions are also consistent with the recent rulings on tying arrangements and exclusive dealing contracts handed down by the Court of Appeals in other circuits (*Baker* v. *Simmons Co.*, (1 Cir.) 307 F2d 458; *Dehydrating Process Co.* v. *A. O. Smith Corp.*, (1 Cir.) 292 F2d 653, cert. den. 368 U. S. 931 (A-26); *Denison Mattress Factory* v. *The Spring-Air Co.*, (5 Cir.), 308 F2d 403 (A-21)).

POINT II.

The courts below did not hold that trademark protection justifies proscribed tying and exclusive dealing contracts.

At page 3 of the petition, under the heading "Questions Presented" there appears: "3. Whether trademark protection justifies proscribed tying and exclusive dealing contracts?" By so phrasing the question, the petitioners imply that the decisions of which review is sought, so held. The concurring opinion of the Court of Appeals clearly recognized that a trademark did not grant to its owner exemption from compliance with the antitrust laws. Thus (A-25):

> "There may, of course, be cases where a trade-mark has acquired such prominence that the coupling of some further item to its license would constitute a per se violation; but such a trade-mark would satisfy the market dominance test of Times-Picayune and Northern Pacific. The figures show that Carvel is not such a mark."

POINT III.

The Supreme Court should not review findings of fact made by the Trial Court and affirmed by the Court of Appeals.

The burden of proof was upon the plaintiffs to prove a per se violation of the antitrust laws. In a treble damage suit "the trier of the facts must be solidly convinced that petitioner has proved his case by a preponderance of the evidence." (*Clark Marine Corporation* v. *Cargell, Inc.*, (D. C. E. D.) Louisiana 1964, 226 F. S. 103, 111). "The proof

should be stronger than in an ordinary civil action" (*Paramount Film Distributors Corp.* v. *Applebaum* (5 Cir.) 217 F2d 101, 105, cert. den. 349 U. S. 961). The Supreme Court has stated that in antitrust cases the scope of review with respect to issues of fact is quite narrow (*Besser Mfg. Co.* v. *United States,* 343 U. S. 444, 446; *United States* v. *Oregon Medical Society,* 343 U. S. 326; *United States* v. *E. I. du Pont de Nemours & Co.,* 351 U. S. 377, 381).

The petition points to no evidence in the record which would sustain a conclusion that the findings of the courts below are "clearly erroneous" (*United States* v. *United States Gypsum Co.,* 333 U. S. 364, 394). As stated in *United States* v. *Yellow Cab Co.,* 338 U. S. 338, 340-341:

> "The judgment below is supported by an opinion, prepared with obvious care, which analyzes the evidence and shows the reason for the findings. To us it appears to represent the considered judgment of an able trial judge, after patient hearing, that the Government's evidence fell short of its allegations. . . ."

The Court of Appeals examined the tying arrangement in the manner required by the decision in *Northern Pacific Railway Co.* v. *United States,* 356 U. S. 1, 6, in order to determine whether there was "sufficient economic power with respect to the tying product to appreciably restrain free competition in the market for the tied product" and "whether a not insubstantial amount of commerce is affected" (A-11, 23). The concurring opinion probed the uncontradicted evidence on such issues and found that in the tri-state area the 250 Carvel dealers constituted one-fifth of 1% of the ice cream outlets and were apparently doing 1% of the business. The sales of ice cream cones by Eagle to Carvel constituted 1% of its total sales of cones in said area. In competition with Carvel were many other similarly operating chains (A-23-24).

The foregoing evidence was presented by the plaintiffs themselves. They adopted as their exhibit an affidavit which Eagle had submitted in a summary judgment motion and which contained the relevant market data (Eagle Appendix in Court of Appeals 14e-20e). From such evidence only one possible finding could be made, namely: "Not only was the amount of commerce in these not consequential, but any damage to the plaintiffs was even less so" (A-24). The concurring opinion then found that though Carvel's mark-up on the cones was 5%, it charged its dealers a lower price than they could have obtained had they bought in smaller quantities (A-25).

The concurring opinion also found as a fact that Carvel was not required to supply the dealers with specifications for substitute products (A-26-27). The majority of the Court held that the record afforded no basis for upsetting the factual findings of Judge Dawson that it would impose an unreasonable burden to require Carvel to limit itself to advance specifications (A-26). Referring to Vettel's testimony in respect of flavorings of uniform quality, the concurring opinion held that his position "was sufficiently reasonable and persuasive that the judge was entitled to credit it, whether or not one of us would agree" (A-27).

The identical conclusion was reached by the Court of Appeals of the Fifth Circuit in *Dennison Mattress Factory* v. *Spring Air Co.*, 308 F2d 403, a case where the licensees of the Spring-Air trademarked mattress were required to purchase from designated sources all their products and supplies including ticking, innerspring units and labels. The Court held (p. 410):

> "The trademark would be of no worth unless the public could be sure that every mattress which bore that mark was uniform both in exterior design and interior quality. Dennison must accept the judg-

ment of Spring-Air in this requirement. . . : It is doubtful that every tie-in device is unlawful (*Dehydrating Process Co.* v. *Smith*, 292 F2d 653(1)).''

Conclusion.

It is respectfully submitted that the petition for certiorari should be denied with respect to Eagle Cone Corporation.

Respectfully submitted,

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IRVING L. WEINBERGER,
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SUPREME COURT, U.S.

In the

Supreme Court of the United States

October Term, 1964

No. 655

Bernard Simon, et al.,

Petitioners,

—against—

Carvel Corporation, Carvel Dari-Freeze System, Inc., Carvel System Benefit Corporation, Eagle Cuba Corporation, H. P. Hood & Sons,

Respondents.

And Eight Other Cases.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE CARVEL RESPONDENTS IN OPPOSITION

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September, 1964.

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C. Even had the elements of an orthodox tying arrangement been proven, there is no reason for granting review on this petition because the concurrent findings by both courts of economic justification are not shown to be erroneous 20

CONCLUSION 21

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 355

BERNARD SUSSER, *et al.*,

Petitioners,

—against—

CARVEL CORPORATION, CARVEL DARI-FREEZE STORES, INC., CARVEL STORES REALTY CORPORATION, EAGLE CONE CORPORATION, H. P. HOO[illegible] SONS,

Respondents:

And Eight Other Cases.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE CARVEL RESPONDENTS IN OPPOSITION

This brief is submitted by the Carvel respondents[1] in opposition to the petition for a writ of certiorari to review the judgment of the Court of Appeals for the Second Circuit entered on May 8, 1964.

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[1] Respondents Carvel Corporation, Carvel Dari-Freeze Stores, Inc., Carvel Stores Realty Corporation, Carvel Stores of New York, Inc., Carvel Stores of Pennsylvania, Inc., Chain Locations of America, Inc. and Carvehicle Corp. are referred to herein as "the Carvel respondents" or sometimes simply as "Carvel."

Statement of the Case

Petitioners seek a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit (made and entered May 8, 1964), affirming judgment of the District Court dismissing, after trial, their claims for treble damages for violation of the antitrust laws. The opinions of the Court of Appeals are reported in 332 F. 2d 505; the trial court's opinion is found in 206 F. Supp. 636.[2] The last sentence of the trial court's opinion reads (A60): "This opinion shall constitute the findings of fact and conclusions of law of the Court."

A. *Prior Proceedings*

Petitioners' complaints invoked jurisdiction on the ground of diversity of citizenship claiming damages for fraudulent inducement to enter into franchise agreements, and also asserted independent claims under the antitrust laws based on the alleged illegality of respondents' franchise agreements and conduct pursuant thereto. The cases were referred for all purposes to (the late) District Judge Archie O. Dawson, who, on consent of all parties, tried the cases without jury. Pursuant to orders of consolidation and severance for purposes of trial, the fraud claims were tried first and were all dismissed on the basis of an opinion containing elaborate findings of fact.[3] Petitioners did not appeal from dismissal of their claims based on alleged misrepresentations.

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[2] Hereinafter references to the opinions below will be to pages of the appendix to the petition A-1 to A-29 (Court of Appeals), and A-30 to A-60 (District Court).

[3] The opinion dismissing the fraud claims is not officially reported.

Thereafter, Judge Dawson conducted the trial without jury on the issue of liability on the antitrust claims. Pursuant to a pretrial order which embodied the consent of all parties (A31) "both sides relied primarily on documentary evidence to establish their case" (A32), plaintiffs (petitioners here), having agreed ". . . that they are relying solely upon alleged *per se* violations of the antitrust laws and make no claim other than that their evidence will establish *per se* violations of the antitrust laws" (A22; also Carvel Defendants-Appellees Appendix, p. 15c).[4] Except for price fixing provisions of an earlier and superseded franchise agreement, to which four of the petitioners were parties, which were held invalid (A3, A55),[5] Judge Dawson directed entry of judgment dismissing the complaints against all the defendants in his opinion of June 7, 1962. His opinion incorporated findings of fact that plaintiffs had failed to prove any of the violations of the antitrust laws upon which their claims were predicated.

On appeal by petitioners, the Court of Appeals held that the trial court's findings were based on substantial evidence in the record and its conclusions were free of error; set forth independent and concurrent findings and conclusions that appellants (petitioners here) failed to establish any violation of antitrust laws, and affirmed the judgment below. There were two opinions in the Court of

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[4] Further references to this appendix will be identified as "Carvel App."

[5] The invalid pricing provisions were contained in the franchise agreements executed by *Susser*, *McCoy* and *Mueller* in 1954 and by *Frederick* in 1953 (A55 fn. 13). The other plaintiffs, petitioners here, were parties to what the opinions refer to as the "post-1955" franchise or revised franchise agreements and with respect to such petitioners, the unanimous finding of the Court of Appeals (A5-7) confirmed the finding of the trial court (A53-55) that their franchise agreements did not contain unlawful price fixing provisions and that respondents did not otherwise attempt to impose illegal price maintenance.

Appeals, one by Chief Judge Lumbard, writing for the majority in part, and dissenting in part (A2-A22), and the other by Circuit Judge Friendly, writing for a majority of the Court consisting of himself and Circuit Judge Medina (A22-A29).

The affirmance was by a unanimous court in all respects except one. The exception was the subject of the partial dissent by the Chief Judge whose views on the alleged illegal tying arrangements were subjected to specific and documented analysis in the separate opinion of the majority of the court (A23-A29), which concurred with the holding of the trial court that petitioners had failed to sustain their claim of tying arrangements in violation of the Clayton Act. The reasoning of the dissent is as follows:

1. That respondents' dominance or sufficient economic power over a "tying" product, ". . . may be presumed from the use of the Carvel trademark as the principal feature of the Carvel franchise system" (A12, A13);

2. That the franchised dealers' obligation to purchase Carvel special formula mix and other ingredients going into the end product made to Carvel specifications, from respondents or sources which they designate, would satisfy the second requirement of an illegal tying arrangement, if the commerce in such "tied" commodities was not insubstantial unless it was proven that such restrictions are necessary for the protection of Carvel's goodwill (A16, A10); and by this route the dissenting judge reaches his point of dissent, namely:

3. That it would be best to relieve petitioners of their stipulation[6] embodied in the pretrial order and "to remand the cause to the district court for a further hearing limited to the issue of justification" (A18), inasmuch as he considered the evidence on the subject of justification, particularly the testimony of Vettel, "to be unsatisfactory and inconclusive" (A16).

A summary of the findings and reasoning on which the majority opinion rejects the view expressed in dissent are:

a. A remand was neither required nor warranted on the claim respecting the "tied" purchases of flavoring, toppings and cones ". . . in the light of the pretrial order to which plaintiffs agreed" (A22);

b. Respondents did not have sufficient economic power with respect to a "tying" product to appreciably restrain competition in the market for the "tied" product, because the evidence in the record showed (i) that in the areas of greatest activity, New York, Connecticut and Massachusetts, the 250 Carvel dealers therein comprised one-fifth of one percent of the outlets where ice cream cones could be purchased and were apparently doing about one percent of the business in this tri-state market (A23); (ii) that

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[6] The relevant portion of the pretrial order quoted in the majority opinion (A22) reads (italics supplied):

"4. That plaintiffs agree that they are relying solely upon alleged *per se* violations of the antitrust laws and make no claim other than that their evidence will establish *per se* violations of the antitrust laws.

"5. Plaintiffs' evidence at the trial on the issue of liability will be limited to (a) written agreements entered into between the Carvel defendants and the plaintiffs, and other documents supplementary thereto or explanatory thereof, (b) written agreements between the Carvel defendants and the supplier defendants, and other documents supplementary thereto and explanatory thereof, and (c) testimony heretofore taken of a Mr. Vettel and a Mr. Bittner."

the Carvel dealers competed with the franchised dealers selling similar products under other brand names as well as with chains and independents selling such products from mobile units, other chain stores such as Howard Johnson, and "with the ubiquitous corner drugstore"; (iii) that a common-sense view of the evidence indicates the "insubstantiality" of the commerce affected in the sales of the "tied" products (A24);

c. While a trademark may conceivably acquire such prominence that the required purchase of other items, conditioned upon its license, would satisfy the market dominance test invoked by the relevant cases defining illegal tying arrangements, this is not such a case because: "The figures show that Carvel is not such a mark" (A25);

d. Dominance or economic power cannot be presumed from the licensing by Carvel of a package of trademarks, design patents of a building, and a patented freezing and dispensing machine because "the focus" [or "tying" element] of the franchising system consists neither of the patented nor of the copyrighted items which are "without motivating significance in bringing about the agreement", but rather the Carvel trademark which the evidence failed to show had acquired sufficient prominence to satisfy the requirement of market dominance (A25):

e. The majority opinion points out that: (i) *Standard Oil Co.* v. *United States*, 337 U. S. 293, 306 (1949) identifies an exceptional situation where the use of tying arrangements would have economic justification for the protection of goodwill namely, ". . . where specifications for a substitute would be so detailed that they could not practicably be supplied" (A26); (ii) respondents' restrictions and practices presented such a situation because of "the problem of controlling something so insusceptible of precise verbal-

zation as the desired texture and taste of an ice cream cone or sundae" (*id.*); (iii) testimony on the point (by Vettel) that it was ". . . impracticable to handle the problem by specification and policing was sufficiently reasonable and persuasive that the [trial] judge was entitled to credit it" (A27); and (iv) decisions of this Court dealing with tying arrangements do not support the dissenting opinion (A23-29);

f. In the context of such evaluation of the facts and the law bearing upon the economic justification for Carvel to protect its goodwill and trademarks, under the special circumstances that were inherent in their use by 400 dealers making and selling ice cream products under the Carvel name, the majority opinion of the Court of Appeals concluded that (A26):

> "The record affords no sufficient basis for upsetting the finding of the District Judge that 'To require Carvel to limit itself to advance specifications of standards for all the various types of accessory products used in connection with the mix would impose an impractical and unreasonable burden of formulation . . .'"

To avoid repetition, we will describe in the course of the argument section of this brief, the grounds for dismissal of further claims of antitrust violations (other than tying arrangements), with respect to which a unanimous Court of Appeals concurred in the findings and conclusions of the trial court.

We will close our statement of the case with a brief summary of the nature of the business transactions involved.

B. *The Carvel Franchise System*

Petitioners became licensees to make and sell at retail ice cream products under the Carvel name in stores of uniform and distinctive appearance and design by agreeing to the terms of a franchise agreement and other instruments which were executed upon the initiation of the relationship. All such dealers used the same freezer-dispenser with a Carvel patented tip which created in the finished product a swirl design associated with the Carvel trademark. Other identifying signs, insignia, display and lighting devices featured the name Carvel.

A manual which supplemented and was part of the franchise agreement instructed the dealers in all phases of the operation of the store, and the preparation and service of the ice cream products (A3-4; A33-35). The trial court found that the uniformity of stores, operation and quality of the product of which the public took notice served to attract "the business to the Carvel operators". "The name Carvel constitutes a trademark of great value to the defendant [Carvel respondents] companies and to the franchised operators" (A36). The Court of Appeals agreed (A20).

At the time of trial, Carvel had 400 dealers, whose peak purchases from Carvel aggregated approximately $5,000,000 (A4). The dealers in Carvel's relatively small chain (A17) compete with numerous independent and chain-store vendors of ice cream products and the franchised dealers of similar organizations such as "Dairy Queen", "Tastee Freez", "Dari-Delite", "King Kone", "Dari-Isle" as Judge Friendly points out in the majority opinion below (A24). While respondents' total sales "are not insubstantial," the Court holds that the record reveals the "insubstantiality" of the commerce in all accessory products, excluding sales of mix (*id.*). The Carvel mix is treated in all

opinions below as a secret formula mix (A8, A21; A24; A34). It is respondents' main product and accounts for two-thirds of the sales of all ingredients (A24, fn. 2). The concurrent findings in all opinions below establish that the purchase of Carvel mix is properly linked to the use of the Carvel trademark (A20-21; A24-25; A46). Accordingly, the Court below concluded that not only was the amount of commerce in the accessory items not consequential, but also that the dealers' small annual outlay for such accessories makes plain that any possible damage to petitioners "was even less so" (A24), namely, trivial (A29).

Respondents do not manufacture or process ice cream mix or other ingredients. They purchase them under agreements with suppliers to whom the Carvel secret formulae and specifications are given under strictly worded provisions to assure secrecy and quality control. These articles necessary for the preparation and sale of products under the Carvel name are resold by respondents to their own dealers and to no one else, and are, indeed, delivered directly by Carvel suppliers to the dealers for the account of Carvel in fulfillment of purchase orders. The dairies (respondents Hood and Rakestraw) agree to "deliver only Carvel mix to Carvel stores, and no other ice cream mix or ice cream preparation of any kind" (A38). Similar agreements and practices are used for respondents' purchase and resale to dealers of cones and other accessory materials made to Carvel specifications (A39).

The dealer agrees in his franchise agreement to buy from Carvel " . . . his entire requirements of Carvel frozen dairy product mix, toppings, flavorings, and other ingredients, cones and any other items sold as a part of the end product that is offered for consumption to the retail purchaser . . . " and Carvel assumes the obligation " . . . to sell to the dealer the dealer's requirements of supplies set forth in this para-

graph . . . " (¶ 6; see Carvel App. 89c-90c; A42). The stated purpose for this mutual obligation is " . . . to safeguard the integrity of Carvel's trademarks" (*id.*). With respect to items that are not made part of the end product sold to the public (such as machinery, equipment and commissary goods), it is provided that the dealer may, but need not purchase any of them from Carvel, specifying that (¶ 9 of the Franchise Agreement; see A42): "The dealer's obligation under this paragraph is satisfied so long as the dealer equips his store and keeps it maintained in accordance with the specifications contained in the manual."

With relation to the prices to be charged by the franchised dealer, the 1955 revision of the franchise agreement provides that the dealer may sell the authorized ice cream products under the Carvel name "at any price that the dealer determines", and that any recommendation as to price "is in no manner binding upon the dealer" (¶ 8, Carvel App. 91c; A53).

This freedom of the dealer to determine for himself the prices to be charged, applied not only to those who signed the revised franchise agreement, but by circulars, letters and changes in the manual, was likewise made applicable to the dealers who had entered into the June, 1955 form of franchise agreement. They made clear that any reference by respondents to retail prices "are deemed to be references to recommended prices only" and that the dealer was "entirely at liberty to vary these prices if you so desire, and we disclaim any intention to control your retail prices" (A54).

It is in the context of the contract provisions and practices here summarized that respondents conducted their business as reflected in the trial of this case with resultant concurrent findings by both courts below, that respondents did not thereby violate the antitrust laws.

ARGUMENT

I.

Respondents did not by agreement or course of conduct engage in illegal price fixing.

The courts below relied upon franchise provisions which explicitly reserve to the individual dealer to set whatever retail prices he desired, supplemented by bulletins and letters "that Carvel had changed its prior pricing policy, and that each dealer now had the right to set his own price, although Carvel did indicate that its suggested retail prices were based upon its own broad experience in customer sales" (A7). Recommendations as to prices are not illegal unless there is a showing of an attempt to enforce a price structure upon vendees. See *Maple Flooring Mfrs. Ass'n* v. *United States*, 268 U. S. 563 (1925); *Cement Mfrs. Protective Ass'n* v. *United States*, 268 U. S. 588 (1925).

The trial court specifically found that such an attempt to impose a binding price structure was not shown (A55). In the light of a preponderance of evidence that dealers were free to select their own prices, it was not error for the trial court to disregard some isolated communications of a different import. A unanimous Court of Appeals concluded that there was "much evidence to support Judge Dawson's finding of fact that Carvel did not engage in an unlawful price fixing scheme" (A7).

Denison Mattress Factory v. *Spring-Air Company*, 308 F 2d 403 (5th Cir. 1962) in a closely similar situation affirmed the trial court's finding "that there was no price fixing in this case" (*id.* at 412). *United States* v. *Trenton Potteries Co.*, 273 U. S. 392 (1927) was cited and applied.

The petition presents no ground for review of this question.

II.

Respondents' agreements and dealings with dairies, other processors and suppliers are not illegal.

Petitioners assert error in the dismissal of their claim predicated upon respondents' agreements with the dairies that they would "deliver only Carvel mix to Carvel stores, and no other ice cream mix or ice cream preparation of any kind" (A38). The Trial Court found that petitioners were not relying on any conspiracy between Carvel and the supplier-defendants or among the supplier-defendants. "No evidence of any such conspiracy was offered" (A37).

Petitioners' brief relies on the effect of such contracts which was to obligate the supplier to refrain from dealing with the franchisee, both in selling the special Carvel mix as well as any non-Carvel mix or other ice cream preparation (Pet. 5-6). The Court of Appeals made findings sustaining those of the District Court on both branches of the contention. With respect to the Carvel special formula mix, it said:

> "... It seems perfectly clear that as the possessor of a secret formula for its ice cream mix, Carvel enjoyed the right to sell it to whomever it chose, and this right was not diluted by its agreement with Hood and Rakestraw to produce the mix" (A21).

With respect to the suppliers' undertaking to refrain from selling non-Carvel products to the individual dealers, the finding was that:

> "Carvel cannot be considered in competition with these suppliers from whom it purchases Carvel supplies, and such an agreement not to deal, even if established, when affected by non-competing enterprises, is not illegal" (A22).

This view is supported by the authorities. See, *Packard Motor Car Co.* v. *Webster Motor Car Co.*, 243 F. 2d 418 (D. C. Cir.), *cert. denied,* 355 U. S. 822 (1957); *Schwing Motor Car Co.* v. *Hudson Sales Corp.*, 138 F. Supp. 899 (D. Md.), *aff'd per curiam,* 239 F. 2d 176 (4th Cir. 1956), *cert. denied,* 355 U. S. 823 (1957).

A unanimous Court of Appeals further found that:

> "The plaintiffs failed to prove that they were foreclosed from alternate sources of supply, or indeed that the supplier defendants themselves had been requested to make sales to the dealers and had refused" (A22; see the corresponding finding in the District Court at A40).

Accordingly, the petition for review on this aspect of the case is without merit.

III.

Respondents' requirement that their dealers sell only Carvel products under the Carvel trademark, name and label was, on substantial evidence, held to be reasonable and necessary to protect respondents' goodwill.

The Court of Appeals was unanimous in affirming dismissal of this claim by application of the criteria set forth in *Tampa Electric Co.* v. *Nashville Coal Co.*, 365 U. S. 320 (1963). It was petitioners' burden to prove the anti-competitive effects of the exclusive dealing arrangement as required by *Tampa* and, said the Court of Appeals (A19):

> "*We find it plain that the appellants have failed to bear this burden.* Instead of introducing evidence to establish the economic effects of the Carvel franchise structure, they merely protest that anti-competitive effects may be inferred solely from the existence of such a network of exclusive dealerships. But the whole tenor of

Tampa Electric does not permit adherence to such a stringent standard of legality" (emphasis supplied).

The Court of Appeals relied on an independent ground for affirming dismissal of this claim, namely, the existence of economic justification for respondents' exclusive dealing provisions. This justification was derived from the necessity, propriety and desirability of protecting valuable trademarks which were "the cornerstone of a franchise system" (A20). Said the Court of Appeals (*id.*):

> "The requirement that only Carvel products be sold at Carvel outlets derives from the desirability that the public identify each Carvel outlet as one of a chain which offers identical products at a uniform standard of quality. The antitrust laws certainly do not require that the licensor of a trademark permit his licensees to associate with that trademark other products unrelated to those customarily sold under the mark. It is in the public interest that products sold under one particular trademark should be subject to the control of the trademark owner."

On the same reasoning, respondents justifiably refused to allow their dealers to sell unauthorized products such as Christmas trees or hamburgers (*id.*), more particularly, as the District Court pointed out, since respondents cannot be considered a competitor in these other non-ice-cream products, a consideration which renders Section 3 of the Clayton Act inapplicable (A49).

For examples of the area of permissive conduct by an owner of a trademark under a licensing agreement, see *E. I. du Pont de Nemours & Co.* v. *Celanese Corp. of America*, 167 F. 2d 484 (Ct. of Cust. and Pat. App. 1948); *Arthur Murray, Inc.* v. *Horst*, 110 F. Supp. 678 (D. Mass. 1953);

Morse-Starrett Prod. Co. v. *Steccone*, 86 F. Supp. 796 (N. D. Calif. 1949).

For other examples holding exclusive dealing provisions reasonable and not in violation of the antitrust laws in analogous situations, see *Bascom Launder Corp.* v. *Telecoin Corp.*, 204 F. 2d 331 (2nd Cir. 1953), *cert. denied*, 345 U. S. 994. *Denison Mattress Factory* v. *Spring-Air Company, supra; Pick Mfg. Co.* v. *General Motors Corp.*, 80 F. 2d 641 (7th Cir. 1935), *aff'd per curiam*, 299 U. S. 3 (1936); *Boro Hall Corp.* v. *General Motors Corp.*, 124 F. 2d 822 (2nd Cir. 1942); cf., *Arthur Murray Inc.* v. *Horst*, 110 F. Supp. 678 (D. Mass. 1953).

Petitioners' oblique intimations that respondents' franchise business is tainted with predatory intent to violate the antitrust laws (Pet. 9) are quite synthetic. The courts below made specific findings to the opposite effect. With respect to a franchise system generally, the District Court pointed out that it provides the public with an opportunity to get a uniform product at numerous points of sale "from small independent contractors rather than from employees of a vast chain" (A35). "The franchise system of operation is therefore good for the economy" (*id.*). Respondents in the operation of their franchise system were properly concerned with restricting the sale of ice cream products under the Carvel trademark in stores of distinctive design identified with the Carvel name because (A49):

> "Any defects in quality over which Carvel would have no control would detract from the Carvel name and goodwill."[7]

---

[7] The majority opinion of the Court of Appeals included the exposure to risk from use of unauthorized products as a ground for justifying Carvel "to insist on products in which it has complete confidence" (A27-28).

Under these circumstances, and because of the perishable nature of the food products involved, the trial court found that (A50):

> "The exclusive dealing provisions as to these products are aimed primarily at control of quality and are not part of a design by Carvel to monopolize business in any of these fields."

The like finding by the Court of Appeals on this subject included reference to the interest of the public:

> "It is in the public interest that products sold under one particular trademark should be subject to the goodwill of a trademark owner" (A20).

Obviously, then, the opinions below and the record do not present the question as the petition puts it (Pet. 3): "Whether trademark protection justifies proscribed tying and exclusive dealing contracts." This is illustrated by *Timken Roller Bearing Co.* v. *United States,* 341 U. S. 593, 598-9 (1951):

> "Furthermore, while a trademark merely affords protection to a name, the agreements in the present case went far beyond protection of the name '*Timken*' and *provided for control of the manufacture and sale of antifriction bearings whether carrying the mark or not.* A trademark cannot be legally used as a device for Sherman Act violation" (emphasis supplied).

It has been well pointed out in the Report of the Attorney General's Committee to Study the Antitrust Laws (1955, p. 87):

> "The Timken case, therefore, does not cast any cloud upon restrictions in trademark licenses as such. This Committee believes that as in the case of patents, valid trademark rights may provide a lawful main purpose

to which reasonable restriction on competition may be properly ancillary and therefore legal. We also believe that unpatented inventions, know-how, or other trade secret information may give rise to a lawful purpose to which some restrictions on competition may be reasonably ancillary."

It is manifest, we submit, that all reason for granting review of the concurrent findings by the courts below upholding the exclusive dealing features of respondents' franchise system, is wholly absent.

IV.

The "tying" features of respondents' franchise system are justifiably related to the protection of Carvel's goodwill and trademark.

We have already summarized the findings and reasoning on which the majority opinion in the Court of Appeals rejects the views expressed in the partial dissent which is entirely limited to question whether there was justification for respondents' use of the tying arrangements involved in this case. See *supra*, pp. 4-7. The dissent would have preferred a remand to the District Court for further hearing limited to the issue of justification of the tying arrangements in order to protect licensor's goodwill.

A. *Petitioners' contentions.*

The petition recites the existence of the partial dissent as the first reason for granting review. Actually it places no reliance upon the reasoning and conclusion of the dissenting opinion (Pet. 7-9). Petitioners continue to rely solely on *per se* violations (*id.* 5); they argue that *Northern Pacific Ry. Co.* v. *U. S.*, 356 U. S. 1 (1958) assimilated tying arrangements without qualification into the category

of *per se* violation (Pet. 8). They ignored the subsequent statement in *The White Motor Co.* v. *United States*, 372 U. S. 253 at 262 (1963) that: "Tying arrangements or agreements . . . may fall in that category, though not necessarily so."

Petitioners take the further position that (at p. 9): "The protection of goodwill as a justification for tying arrangements has been firmly rejected." In so doing, they ignore what was said in *Standard Stations*, 337 U. S. 293 at 306:

> "The only situation, indeed, in which the protection of good will may necessitate the use of tying clauses is where specifications for a substitute would be so detailed that they could not practicably be supplied."

Petitioners urge that the protection of the Carvel name could be validly accomplished through publication of specifications of standards for the different products used (Pet. 9). Their position is broad enough to include publicized specification of the formulae for the special Carvel mix and essential ingredients going into the final product. This would inevitably destroy the Carvel secret formulae and would cause irreparable harm not only to the business of respondents but to the businesses of several hundred Carvel dealers.

Petitioners assign no reason for this position which brushes aside the limited scope of the dissenting opinion, and at the same time, treats as a nullity the affirmance by a majority of the Court of Appeals of the District Court's findings on the evidence.

B. *Substantial evidence supports the findings that the tying arrangements involved in this case are not illegal under Northern Pacific, supra.*

The record here, as the majority opinion below finds, "showed neither that Carvel had 'sufficient economic power with respect to the tying product to appreciably restrain free competition in the market for the tied product' nor that 'a not insubstantial amount of commerce is affected'" (A23). In other words, neither element in the definition of illegal tying agreements set forth in *Northern Pacific, supra,* was proven in this case.

The related findings based on an analysis of the statistical evidence of respondents' market position has already been summarized (*supra,* pp. 5-6). The courts below found that there was no proof of sufficient economic power over a tying product; that the commerce affected was insubstantial (A24), and the potential harm to petitioners, trivial (A29). The Court of Appeals also considered that the authorities did not authorize a presumption of dominance when the licensing of a trademark is a relevant part of the tying arrangement under scrutiny (A25), or for that matter, even if the use of patented parts and design patents are a relevant part of the tying arrangement (see A27-28 and the authorities there cited and discussed). Under the circumstances of this case, the latter point is academic because (A25):

> "In this case, the patented items appear to have been virtually without motivating significance in bringing about the agreement."

We submit that no basis for review has been shown in this regard, and that this case seems to fall exactly within the language of the exception stated in *Northern Pacific, supra,* 356 U. S. 1 at 6-7:

"Of course where the seller has no control or dominance over the tying product so that it does not represent an effectual weapon to pressure buyers into taking the tied item any restraint of trade attributable to such tying arrangements would obviously be insignificant at most."

C. ***Even had the elements of an orthodox tying arrangement been proven, there is no reason for granting review on this petition because the concurrent findings by both courts of economic justification are not shown to be erroneous.***

The evidence in this case falls within the exception stated in *Standard Stations, supra,* 337 U. S. 293, 306, as pointed out above (*infra,* p. 6). See also *Dehydrating Process Co.* v. *A. O. Smith Corp.,* 292 F. 2d 653 (1st Cir.), *cert. denied,* 368 U. S. 931 (1961); *United States* v. *Jerrold Electronics Corp.,* 187 F. Supp. 545 (E. D. Pa. 1960), *aff'd per curiam,* 365 U. S. 567 (1961).

The Court of Appeals found that the District Court was entitled to give credit to the evidence (not contradicted in the record), that it was "impractical to handle the problem by specification and policing . . ." (A27). The problem referred to was one ". . . of controlling something so insusceptible of precise verbalization as the desired texture and taste of an ice cream cone or sundae" (A26). It was reasonable and necessary for Carvel to furnish specifications to its own source of supply "whose product it regularly checked" rather than rely on policing four hundred dealers. The exposure to risk involved in releasing specifications was another reason for validating Carvel's procedure for selecting the suppliers in whose compliance with Carvel formulae and specifications it would have complete confidence. Accordingly, it was the conclusion of the Court that there

was no basis for upsetting the finding of the District Judge that Carvel should not be compelled to advance specifications of its standards for all the various type of accessory products because such action "will impose an impractical and unreasonable burden of formulation" (A26).

CONCLUSION

None of the reasons assigned by the petition for granting the writ (Pet. 7) are of the character indicated by Rule 19 of this Court. Our analysis of the questions presented demonstrates that the petition fails to show substantial error in the concurrent findings of fact and conclusions of law of the courts below. Failure of the petition to reveal special and important reasons for granting review by writ of certiorari requires its denial.

We respectfully submit that the petition herein should be denied.

Respectfully submitted.

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Supreme Court of the United States

October Term 1964

No. 355

Civil File No. 150-212

BERNARD SUSSER, GERTRUDE SUSSER and SHIRLEY SCHWARTZ, *Petitioners,*

against

CARVEL CORPORATION, CARVEL DARI-FREEZE STORES, INC., CARVEL STORES REALTY CORPORATION, EAGLE CONE CORPORATION, H. P. HOOD & SONS, *Respondents.*

Civil File No. 152-119

LESTER N. MODICK and HARRIET M. MODICK, *Petitioners,*

against

CARVEL STORES OF NEW YORK, INC., CARVEL CORPORATION, CARVEL DARI-FREEZE STORES, INC., EAGLE CONE CORPORATION, H. P. HOOD & SONS, *Respondents.*

Civil File No. 152-120

MARTHA M. McCOY and FRANK T. McCOY, *Petitioners,*

against

CARVEL CORPORATION, CARVEL DARI-FREEZE STORES, INC., CARVEL STORES REALTY CORPORATION, EAGLE CONE CORPORATION, H. P. HOOD & SONS, *Respondents.*

(Other titles continued on back of front cover.)

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT, H. P. HOOD & SONS, INC. IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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Civil File No. 153-193

JAMES OSSOLA and ELIZABETH G. OSSOLA, *Petitioners,*

against

CARVEL STORES OF NEW YORK, INC., CARVEL DARI-FREEZE STORES, INC., CARVEL STORES REALTY CORPORATION, EAGLE CONE CORPORATION, H. P. HOOD & SONS, *Respondent.*

Civil File No. 153-194

JOSEPH P. PHELAN, *Petitioner,*

against

CARVEL STORES OF NEW YORK, INC., CARVEL DARI-FREEZE STORES, INC., CARVEL STORES REALTY CORPORATION, EAGLE CONE CORPORATION, H. P. HOOD & SONS, *Respondents.*

Civil File No. 60 Civil 1096

MATTHEW SEU and JANE L. SEU, *Petitioners,*

against

CARVEL CORPORATION, CARVEL STORES OF NEW YORK, INC., CARVEL DARI-FREEZE STORES, INC., CARVEL STORES REALTY CORPORATION, EAGLE CONE CORPORATION, H. P. HOOD & SONS, *Respondents.*

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Supreme Court of the United States

October Term 1964

No. 355

Civil File No. 150-212

BERNARD SUSSER, GERTRUDE SUSSER and SHIRLEY SCHWARTZ,

Petitioners,

against

CARVEL CORPORATION, CARVEL DARI-FREEZE STORES, INC., CARVEL STORES REALTY CORPORATION, EAGLE CONE CORPORATION, H. P. HOOD & SONS,

Respondents.

and Five other Actions

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT, H. P. HOOD & SONS, INC. IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Statement

The petitioners request this Court to review the decision and judgment of the Court of Appeals, Second Circuit, which affirmed judgments of the District Court, Southern District of New York, dismissing nine actions in which the petitioners claim treble damages for alleged violation of the antitrust laws.

The respondent, H. P. Hood & Sons, Inc. ("Hood"), which is engaged in the manufacture and sale of dairy products, was a defendant in six of those nine actions. The nine actions were tried by the Court, without a jury, and the six complaints against Hood and other defendants were dismissed.*

The petitioners, plaintiffs in those six actions, are the operators, under franchise agreements, of Carvel retail ice cream stores. In each of the stores, petitioners sold to the public Carvel frozen dairy products, manufactured by petitioners, using as the basic component Carvel's Special Formula Ice Cream Mix, processed by Hood for Carvel.

Petitioners' six actions were brought primarily against the Carvel Corporation and several of its subsidiaries, collectively referred to as "Carvel". But petitioners also joined, as defendants, certain independent companies of whom Hood is one, which furnish supplies to the Carvel companies and deliver those supplies on Carvel's instructions, directly to the Carvel retail stores. These peripheral defendants are sometimes referred to collectively in the opinions below as the "supplier defendants."

In addition to plaintiffs' claims based upon the antitrust laws, the complaints originally contained claims against the Carvel defendants *only,* alleging that plaintiffs had been induced by fraud on the part of Carvel to enter into the franchise agreements with Carvel. These fraud claims, however, were severed

* Separate judgments in favor of the supplier defendants were entered at the direction of the District Court pursuant to Rule 54(b) of the Federal Rules of Civil Procedure.

from the antitrust claims and were tried before the District Court without a jury. But Hood was never charged with any fraud and took no part in that trial. The District Court directed that those fraud claims against Carvel be dismissed.

Petitioners abandoned before trial their original far-flung allegations of conspiracy between Carvel and the supplier defendants. Also, by Pretrial Order they agreed that they "make no claim other than that their evidence will establish *per se* violations of the antitrust laws." They further agreed that their evidence at the trial would be limtied to: written agreements entered into between the Carvel defendants and the plaintiffs and supplementary or explanatory documents; and to written agreements between the Carvel defendants and the supplier defendants, including Hood. (Pretrial Order No. 5,—R, III, 15c*; also quoted Op. A-22, A-23**)

But none of the agreements between Carvel and the plaintiffs contains any mention of Hood. The only agreements which mention Hood are five Carvel-Hood supply contracts. The sole issue pertaining to Hood, therefore, is whether these supply contracts evidence agreements or practices which constitute *per se* violations of the antitrust laws.

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* Letter "R", followed by Roman numeral indicating volume and Arabic numeral indicating page, refers to the certified appendix record filed in this Court by the Petitioners.

** Hereinafter references to the opinions below will be to pages of the Appendix to the Petition A-1 to A-29 (Court of Appeals), and A-30 to A-60 (District Court).

To sustain such violations against Hood, petitioners must establish that these supply contracts evidence one of those:

> "* * * agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use." *Northern Pac. R. Co.* v. *United States,* 356 U. S. 1, 5 (1958).

The Carvel-Hood supply contracts evidence no such agreements or practices. Both Courts below so held.

Petitioners expressly declared that they do not charge that Hood and the supplier defendants engaged in any general or common conspiracy with Carvel and with each other in furtherance of violations of anti-trust laws. The alleged liability of Hood therefore is predicated upon the theory of a separate unlawful conspiracy on the part of Hood *with Carvel* not to sell direct to petitioners.

Conformably the District Court stated in its opinion (Op., A-37):

> "The liability of the supplier defendants is predicated upon alleged unlawful conspiracies on the part of each of the supplier defendants with Carvel not to sell direct to the plaintiffs. The plaintiffs do not contend that the supplier defendant engaged in any common conspiracy with Carvel and with each other in furtherance of any illegal end. No evidence of any such conspiracy was offered; the plaintiffs relied on the agreements between Carvel and the supplier defendants to establish the unlawful conspiracies."

POINT ONE

Hood did not participate in any illegal conspiratorial boycott with respect to direct sales to petitioners or engage in any other violations of the antitrust laws.

I

The five Carvel-Hood supply contracts are not illegal per se or otherwise.

Carvel engaged Hood, a well known supplier of quality dairy products, to process for Carvel all of its requirements of a special type and kind of ice cream mix to be made according to Carvel's special recipe or formula and to deliver this mix to Carvel retail stores to be located in Massachusetts and Connecticut.

The basic provisions here pertinent incorporated in all of the supply contracts between Hood and Carvel, are: that Carvel shall furnish Hood with a certain secret and confidential mix formula, calling for the highest quality ingredients; that Hood shall manufacture this mix in strict compliance with that formula; that Hood shall deliver only Carvel mix to Carvel stores and no other mix or ice cream preparation; that Hood shall sell this mix only to Carvel; and that Hood shall not reveal without Carvel's authorization the contents of the secret formula to any other person. (Contract—R, III, 139c-153c)

The following facts were established at the trial without contradiction both by stipulation of the parties and by the uncontroverted testimony of Hood's witness, Walter Simonsen, Hood's ice cream mix sales manager (Stip., R, III, 51c-54c; W. Simonsen, R, III, 55c-72c):

> Hood did not participate in the negotiations for or in the preparation and execution of Carvel's

franchise or other agreements with its store operators; and Hood was not a party to and had no knowledge of any of those agreements.

Hood did not participate in the negotiations for or in the preparation or execution of any agreement between Carvel and any other supplier; and Hood was not a party to and had no knowledge of any of those agreements.

Hood did not participate in any way in the preparation of the Carvel S.O.P. Manual; never saw and had no knowledge of that Manual; and had nothing whatsoever to do with the manner in which the Carvel stores were operated.

The Carvel mix manufactured by Hood for Carvel is processed according to Carvel's special secret formula, the stabilizer and emulsifier being supplied by Carvel; and the mix differs from all other ice cream mixes manufactured by Hood.

Hood did not participate in the determination of the prices at which Carvel sold its ice cream mix to its store operators or in the determination of any of the other conditions of sale to those operators.

The Carvel stores do not sell ice cream mix to the public in the form in which it is delivered by Hood to the stores; and the mix is used only as a component of various frozen dairy products manufactured by the store operators.

Hood never participated in any way in the determination of the prices charged to the public by the operators of Carvel stores for the frozen dairy products manufactured and sold by the Carvel stores to the public.

II

Carvel's requirement that Hood deliver no ice cream mix or ice cream preparation other than Carvel mix to the Carvel stores is necessary and proper to protect both Carvel and the consuming public and is in no sense illegal.

The provisions that Hood would deliver no ice cream mix or ice cream preparation other than Carvel mix to Carvel stores was obviously necessary to protect the public against possible fraudulent imposition.

All Carvel stores display a large exterior sign bearing the name "CARVEL" and in most instances a replica of a Carvel ice cream cone. Moreover, the name "CARVEL" appears on much of the equipment contained within the stores and is imprinted on the menus, bulletins, placards and advertisements placed in or about the stores. Thus the name "CARVEL" has come to be identified indelibly in the public mind only with quality ice cream products sponsored by Carvel and sold in Carvel stores. (Op. A-35, A-36)

The public had a right to expect, and undoubtedly does expect, that Carvel stands behind the products which are sold at these stores, and that it exercises proper control to insure that these products conform to high standards of taste, quality and healthfulness.

Moreover, each store operator benefits from the continued high reputation of Carvel. For customers who have no knowledge of the particular store or of its franchise operators will, nevertheless, stop and make purchases because of the Carvel reputation. (Op. A-36)

In order to insure that all products sold at Carvel stores will conform to Carvel's high standards and fulfill the public expectations which Carvel has created, Carvel itself must control the supply of ice cream mix to the stores. Therefore, because Hood and not Carvel processes the mix delivered to the Carvel stores in Connecticut and Massachusetts, Hood is required to follow the secret formula originated and supplied to it by Carvel.

Further, in order to insure that the store operators will use only Carvel mix and not some other mix prepared according to different or varying standards, Carvel has contracted with Hood that Hood will deliver only Carvel mix and no other ice cream mix or ice cream preparation to Carvel stores. (Contract par. 5(f), R, III, 142c)

Thus, it is readily seen that this requirement is soundly in the public interest. For Hood to breach its agreement with Carvel, as petitioners seem to contend it should, might well make Hood an accomplice in a fraudulent imposition upon the public.

Any misrepresentation of food products, particularly of highly perishable products such as frozen dairy products, is a matter of vital public concern. The public must rely upon the integrity of the organization under whose name and sponsorship a food product is sold, for protection from inferior, unsavory and possibly unhealthful products. That this is so is confirmed by Section 19-202 of Chapter 341 of the General Statutes of Connecticut. (R, III, 240c) And, substantially identical language appears in Section 65L

(b) of Chapter 94, Title XV of the General Laws of Massachusetts. (R, III, 238c-239c)

If Hood were to deliver an ice cream mix other than the Carvel mix to Carvel stores, and if such mix were to be placed in Carvel mix machines, and the products made therefrom sold to the public under the Carvel name, such conduct could subject both Hood and the store operators to liability under those Massachusetts and Connecticut statutes.

Clearly the requirement that Hood deliver no ice cream preparation other than Carvel mix to the Carvel stores is not "pernicious" in any sense, and, on the contrary, possesses striking affirmative virtues. It merely would prohibit a practice which would be so clearly in violation of the public interest that it could not possibly be justified on any theory.

III

The provision that Hood manufacture Carvel mix exclusively for Carvel, in accordance with Carvel's special secret formula, and supply Carvel with all of its requirements in a specified area, is also patently proper.

The Carvel-Hood contracts provide that Hood shall manufacture a particular type of ice cream mix exclusively for Carvel, according to specifications provided by Carvel.

The lack of authority for any contention that this type of exclusive arrangement constitutes a *per se* violation of the antitrust laws is indicated by the terms of a consent decree in *United States* v. *Ecko Products,*

1957 CCH Trade Cases, para. 68,768 (N. D. Cal., 1957), which provides, among other things:

> "Nothing in this Section VIII shall be deemed to prevent defendants from contracting for the manufacture *exclusively for them* of specific silicone compounds in accordance with the formulas and specifications furnished by defendants." (Emphasis supplied; p. 73,129)

Certainly the Department of Justice would not have consented to a decree which specifically permitted a practice which might, on any theory, be considered a *per se* violation of the antitrust laws.

The legality of the arrangement here involved is further clear from *Packard Motor Car Co.* v. *Webster Motor Car Co.*, 243 F. 2d 418 (D. C. Cir. 1957), *cert. denied*, 355 U. S. 822 (1957).

Other authorities which unmistakably indicate the legality of the Carvel-Hood supply contracts include: *Bascom Launder Corp.* v. *Telecoin Corporation*, 204 F. 2d 331 (2d Cir.), *cert. denied*, 345 U. S. 994 (1953), and *United States* v. *Bausch & Lomb Optical Co.*, 45 F. Supp. 387 (S. D. N. Y. 1942), *aff'd by an equally divided Court*, 321 U. S. 707 (1944).

The Carvel-Hood supply contracts provide that Carvel will purchase from Hood all its requirements of Carvel mix in a specified area. This provision does not constitute a *per se* violation or any violation of the antitrust laws. The fact that requirements contracts are not *per se* illegal was made irresistibly clear by the decision of this Court in *Tampa Electric Co.* v. *Nashville Coal Co.*, 365 U. S. 320 (1961).

IV

Both of the Courts below held that the Carvel-Hood supply contracts did not involve any violations of antitrust laws.

Clearly, neither the Carvel-Hood supply contracts nor any of Hood's conduct pursuant to them constitute a *per se* or other violation of the antitrust laws. On the contrary, Hood's proof affirmatively establishes: that these contracts have many patent virtues and require no redemptive justification; and that they are all reasonable and proper for the protection of the legitimate proprietary interests both of Carvel and of the store operators themselves—as well as the interests of the consuming public. And there is no proof whatsoever that the contracts have any adverse effect upon competition, much less a "pernicious" effect.

As the District Court said in its opinion (Op., A-38):

> "It is difficult to see exactly what plaintiffs consider to be the illegality of the dairy companies' contractual arrangements with Carvel. . . . the plaintiffs failed to prove that such provisions were in fact illegal. See *Tampa Electric Co.* v. *Nashville Coal Co.*, 365 U. S. 320 (1960); *United States* v. *Columbia Steel*, 334 U. S. 495 (1948).
>
> "As to the alleged refusal to deal direct, certainly the plaintiffs had no right to purchase Carvel Mix, made pursuant to Carvel's secret formula, other than on the terms which Carvel prescribed. Carvel had the right to bind the dairy companies to manufacture this secret formula mix solely for its own use or for persons whom it might designate. No outsider or any of the plaintiffs, without Carvel's approval, had the right to require the dairy companies to sell them this special formula mix. This conclusion seems obvious."

The District Court also said with respect to plaintiffs' alleged second possible basis for liability (Op., A-39):

> "As a second possible basis for liability, the plaintiffs appear to rely on the fact that the supplier defendants would not sell them ice cream mixes other than the Carvel Mix . . . or other than Carvel approved merchandise . . . As previously mentioned, the Hood-Carvel supply contracts provided that Hood would deliver no ice cream preparation other than Carvel Mix to Carvel stores . . ."

The District Court then found that plaintiffs' argument that the provisions of the supply contracts are illegal must fail for several reasons and pointed out, among other things: that plaintiffs had failed to prove that they had asked any of the supplier defendants to make sales of unapproved merchandise and that they refused to do so; and that the plaintiffs had made no showing that they could not obtain non-Carvel merchandise from other suppliers or that the refusal of the supplier defendants to sell them such merchandise deprived them of any access to these goods. In conclusion the Court stated:

> ". . . plaintiffs' evidence failed to make out any illegal conduct on the part of the supplier defendants and the case against them must therefore be dismissed." (Op., A-40)

The Court of Appeals unanimously affirmed, in all respects, the foregoing views of the District Court. As to the agreement that Hood would produce ice cream mix under Carvel's secret formula which Hood pledged

itself not to divulge, Chief Judge Lumbard, speaking for the Court of Appeals, said (Op., A-21):

> "With regard to Carvel's contracts with Hood and Rakestraw, which produced Carvel ice cream mix in accordance with a secret formula which they pledged not to divulge, it seems perfectly clear that as the possessor of a secret formula for its ice cream mix Carvel enjoyed the right to sell it to whomever it chose, and this right was not diluted by its agreement with Hood and Rakestraw to produce the mix. Carvel was free to insist that Hood and Rakestraw produce the mix solely for Carvel and subject to Carvel's wishes as to its disposition."

As to the agreement by Hood not to sell non-Carvel products to the store operators, the Court of Appeals further said (Op., A-21, A-22):

> "As for the provision in the contracts between Carvel and Hood, Rakestraw, Eagle, a cone manufacturer, and Mohawk, a manufacturer of paper products, that the suppliers would not sell non-Carvel products to the individual dealers, we find no merit in the plaintiffs' claims. Carvel cannot be considered in competition with these suppliers from whom it purchases Carvel supplies, and such an agreement not to deal, even if established, when effected by non-competing enterprises is not illegal. See, e.g., *Packard Motor Car Co.* v. *Webster Motor Car Co.*, 243 F. 2d 418 (D. C. Cir.), cert. denied, 355 U. S. 822 (1957). Moreover, the plaintiffs failed to prove that they were foreclosed from alternate sources of supply or indeed that the supplier defendants themselves had been requested to make sales to the dealers and had refused."

Judge Dawson in the District Court had similarly held that even if the supplier defendants agreed with

Carvel not to sell other than Carvel approved products to the franchise operators such agreement by two persons not in competition with each other would not have constituted an illegal boycott, citing: *Packard Motor Car Co.* v. *Webster Motor Car Co.*, 243 F. 2d 418 (D. C. Cir.), *cert. denied*, 355 U. S. 822 (1957); *Schwing Motor Car Co.* v. *Hudson Sales Corp.*, 138 F. Supp. 899 (D. Md.) *aff'd per curiam*, 239 F. 2d 176 (4th Cir. 1956), *cert. denied*, 355 U. S. 823 (1957). (Op., A-39, A-40)

POINT TWO

Petitioners have not advanced a single reason for granting a review of the decision below in favor of Hood and their petition for a writ of certiorari should be denied.

The petition for review of the unanimous affirmance by the Court of Appeals of the District Court's decision in favor of Hood presents, as to it, separate and clearly defined questions. But not a single argument or reason has been advanced to support any contention that the decision below in favor of Hood is in any respect erroneous and should be reviewed. We submit that the case against Hood should now be terminated without further review and that the writ of certiorari should be denied.

Dated: New York, N. Y.
September 11, 1964

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1964

No. 355

BERNARD SUSSER, et al.,
Petitioners,

vs.

CARVEL CORPORATION, et al.,
Respondents,

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONERS

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IN THE

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONERS

Opinions Below

The opinion of the Court of Appeals is reported at 332 F. 2d 505. The opinion of the District Court is reported at 206 F. Supp. 626.

Jurisdiction

The judgment of the court below was entered on May 8, 1964 (R. 456). A petition for a writ of certiorari was filed on August 6, 1964 and was granted on October 26, 1964 (R. 459). The jurisdiction of this Court is invoked under 28 U. S. C. Section 1254(1).

Statutes Involved

Title 15, United States Code.

§ 1. TRUSTS, ETC., IN RESTRAINT OF TRADE ILLEGAL; EXCEPTION OF RESALE PRICE AGREEMENTS; PENALTY

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: * * * July 2, 1890, C. 647, § 1, 26 Stat. 209; Aug. 17, 1937, c. 690, Title VIII, 50 Stat. 693; July 7, 1955, c. 281, 69 Stat. 282.

§ 14. SALES, ETC., ON AGREEMENT NOT TO USE GOODS OF COMPETITOR

It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities whether patented or unpatented, for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies, or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce. Oct. 15, 1914, c. 323, § 3, 38 Stat. 731.

Questions Presented

1. Whether the admitted sales policy and practice of the Carvel respondents, whereby they conditioned their franchise to retail dealers, the use of their trade marks and the sale and lease of their patented equipment, upon the dealer's purchase, use and sale in connection therewith other unpatented products of said respondents, constitute *per se* violations of the antitrust laws.

2. Whether an exclusive dealing contract, where it is an integral part of a proscribed tie-in arrangement, is a *per se* violation of the antitrust laws.

3. Whether trademark protection justifies proscribed tying and exclusive dealing contracts.

4. Whether the agreements between Carvel and the supplier respondents,[1] whereby the latter are obliged to refrain from dealing with or selling to petitioners, violate the Sherman Act.

5. Whether the admitted practice and policy of the Carvel respondents constitutes unlawful price maintenance in violation of the Sherman Act.

Statement of the Case

Petitioners were plaintiffs in nine private antitrust suits brought in the Southern District of New York. Each was or had been a franchisee of one of the Carvel respondents. There was a joint trial before the court on the issue of liability alone. Petitioners agreed to rely solely on *per se* violations and to limit their evidence to written agreements and other documents (R. 5).

The several corporate Carvel respondents (referred to collectively as Carvel) franchise independent dealers to manufacture and sell at retail frozen dairy products, chiefly soft served ice cream, under various "Carvel" trademarks. Carvel itself neither produces nor sells such ice cream nor does it own or hold any of the Carvel trade marks, whether by registration or assignment, all of which are registered in the name of and owned by one Thomas Carvel.

Carvel also engages in the manufacture of a patented freezer used in the manufacture of soft ice cream which is

---

[1] Eagle Cone Corporation, H. P. Hood & Sons and Rakestraw's Dairy Products, Inc.

available and sold to its franchised dealers and to no others under any conditions (R. 42). In connection and simultaneously with the execution of the franchise agreements (Pl. Ex. 1, R. 208, 3149, and Ex. 2, R. 221; 3150), Carvel sells and leases to the dealer the patented freezer and other patented and unpatented equipment required for the operation of a franchised store (R. 34, 35; Pl. Ex. 3, R. 349, 3154; Ex. 4, R. 239, 3156; Ex. 6, R. 242, 3158). Ex. 1 is the franchise agreement used generally by Carvel subsequent to 1955 and is typical of some 200 such agreements (R. 10, 11). Ex. 2 is typical of the pre-1955 agreement (R. 11). All told, Carvel had some 400 franchised stores located principally in nine or ten states (R. 19, 30). Ex. 3, reciting that the equipment is sold "subject to the franchise contract", is typical of the pre-1955 sales contract (R. 12) whereas Ex. 4 is typical of the post-1955 sales agreement (R. 12).

By Ex. 6, Carvel leases to the dealer, amongst other things, patented equipment for use in the operation of the franchised store, conditioned upon the lessee's faithful performance of the terms of the land lease covering the store premises. The lease of these items is further conditioned upon the dealer's compliance with the terms of the franchise agreement (see "conditions" annexed to Ex. 4). The land lease itself (R. 14, Pl. Ex. 7A, R. 250, 3162) is conditioned upon the dealer's faithful compliance with the terms of the franchise.

The franchise agreements require the dealer to purchase from Carvel or its designated approved sources his entire requirements of mix [2], toppings, flavorings, cones and all other ingredients or supplies whether they are integral parts of the soft ice cream end product or merely used in connection with the sale thereof to the ultimate consumer. All such ingredients and supplies are sold by Carvel to the dealer at a profit. The mix is manufactured for Carvel by

[2] The basic ingredient used in the manufacture of ice cream.

designated dairies and drop shipped to all Carvel dealers in the territory allocated to such dairy (Pl. Ex. 10, R. 252, 3186; Ex. 15, R. 337, 3204). Ice cream cones are similarly drop shipped by a designated manufacturer to dealers located in its assigned territory. The specifications for cones are that they be "of a quality no less good than the standard quality cones produced by the Supplier at the time of the execution of this agreement" (Pl. Ex. 11, R. 264, 3186, 7). The manufacturers of both mix and cones bill same to the dealers on Carvel invoice forms at prices determined by Carvel (Pl. Ex. 10, 11 and 15; R. 179). All other ingredients and supplies are manufactured for Carvel by designated suppliers in accordance with specifications and standards of quality furnished by Carvel (R. 39, 41, 197, 199, 200, 203).

In this connection, Walter Simonsen, Hood's sales manager (R. 180) testified that there are many concerns who supply comparable flavorings (R. 39). Fred Vettel, Jr., Carvel's general manager (R. 32) also admitted that ingredients of comparable quality are obtainable from other than Carvel designated sources, but that Carvel does not furnish dealers with specifications and would not permit the dealer to purchase same even if they met Carvel specifications (R. 40, 1). He asserted that it would be impossible for Carvel to determine whether its dealers were following the specifications (R. 41).

The franchise agreements further require the dealers to refrain from selling any other frozen dairy product or any products of any kind unless first approved by Carvel. The agreements also prohibit the dealer from operating a competitive dairy products business anywhere during the term of the agreement. Additionally, they require the dealers to operate their stores in accordance with a Standard Operating Procedure Manual (Pl. Exs. 8 and 8a, R. 15)[3] which is "deemed to be an integral part of this agreement

[3] These exhibits were brought to the court pursuant to Rule 38

with the same force and effect as if it were physically included herein" (Pl. Ex. 1, R. 210). Further requirements were a conditional reassignment of the lease by the dealer to Carvel as security for the former's adherence to the terms of the franchise (Pl. Ex. 7, R. 245, 3162).

Each of the plaintiffs entered into franchise agreements with Carvel. The basic agreement was revised by Carvel in 1955 so that two types of franchise are involved (Pl. Exs. 1 and 2). Four of the plaintiffs[4] entered into the early franchise while the others had the later franchise.

From 188 stores in October, 1954 (R. 29), Carvel stores grew to between 350 and 400 in 1959 (R. 30). Carvel's gross sales of ingredients and supplies ranged from $2,738,255 in 1954 to $3,965,923 in 1960. Including equipment sales, the total figure for 1954 was $4,383,001 and for 1960, $4,460,689. The sales of mix alone were $1,972,352 in 1954 and $2,611,324 in 1960 (R. 29).

It is conceded that the end product manufactured by the dealer is a new product not delivered by Carvel (R. 15).

The Franchise Agreement

In the early franchise (Pl. Ex. 2), the dealer agrees to sell only Carvel frozen dairy products (par. 4[b]); to purchase only Carvel mix (4[c]); to purchase all equipment from Carvel (4[d]); to purchase and use only Carvel approved paper goods, napkins, cones, extracts, and spoons (4[e]); to devote the store and the premises *solely* to the sale of Carvel products and for no other purpose (4[h]); to pay a royalty to Carvel on every gallon of mix (4[j]); to refrain from selling any frozen products other than that processed from Carvel mix through Carvel freezers, and to refrain from selling any other product without Carvel's written consent (4[o]); to refrain from using the store

[4] Susser, McCoy, Frederick and Mueller.

for any purpose other than the sale of Carvel products (4[t]); to maintain prices as per the SOP and to refrain from conducting reduced price sales without Carvel's written consent (4[x]); and to refrain from engaging in a dairy products or competitive business at any other location during the term of the franchise.

Par. 5(b) provides for a loan agreement for the use of the front assembly plate and certain signs and other insignia.

Upon termination of the franchise, the dealer is prohibited from engaging, directly or indirectly, in the sale of frozen dairy products for a period of five years (par. 27).

Par. 29 permits Carvel to change the SOP in price and quantity of merchandise to be dispensed, and further provides that any uniform change in the operational sales price of the products shall be uniformly increased throughout the operation of all Carvel stores.

The loan agreement referred to in par. 5(b). (Ex. 5), covers the patented front assembly plate, including the decorator tip, and certain signs and insignia. These remain the property of Carvel and are forfeited upon, *inter alia*, breach of the franchise agreement.

Par. 15 gives Carvel the right upon termination or cancellation of the agreement for any reason to have the lease of the premises assigned to it without receiving compensation therefor, and par. 16 similarly gives Carvel the right upon termination or cancellation for any reason to purchase the Carvel freezers at 50% of cost during the first year and less an additional 10% for the second year and a further sum of 5% for each year thereafter.

Par. 18 requires the dealer to provide at his own expense product liability insurance with limits of $100,000/$300,000 for the protection of Carvel.

Par. 30 requires the dealer, in the event his volume of business reaches a certain figure, to purchase additional Carvel equipment.

Under par. 5(e), the dealer is granted an exclusive territory within one-half mile in either direction of his location, while par. 27 prohibits him, upon cancellation of the franchise, from engaging in a similar business for a period of five years therefrom.

In the later franchise (Ex. 1), the dealer agrees to sell only Carvel's frozen dairy product solely in accordance with the SOP and no other product (par. Fourth); to purchase from Carvel or approved sources his *entire* requirements of mix, toppings, flavorings, cones, ingredients and all items sold as part of the end product (Sixth); to pay a royalty on each gallon of mix (Seventh); to refrain from mortgaging or otherwise encumbering the premises or equipment (Nineteenth); and to refrain from engaging in a similar business for five years and within a radius of 25 miles after termination of the franchise (Thirty-first).

The agreement also provides that the dealer shall have the right to sell the product at any price he determines (Eighth) and that he may purchase equipment and paper goods from other sources provided they meet Carvel standards and the specifications contained in the SOP (Ninth).

Par. Twelfth grants the dealer an exclusive territory within one-half mile in a metropolitan area or two miles in a suburban area in either direction of the store, whereas par. Thirty-first restricts the dealer, upon termination, from engaging in a similar business for a period of five years and within a radius of twenty-five miles of the store.

The pre-1955 and post-1955 SOP (Exs. 8 and 8A) are substantially identical. In both, Section B requires the dealer to devote his store and premises solely to the sale of Carvel frozen dairy products. Section D, under Point

of Sale Advertising, requires the dealer to only use sign material in accordance with Carvel specifications, which he must obtain from Carvel. Invariably, such sign material is furnished with the retail price already printed thereon. Section H lists commissary supplies that *must* be purchased from Carvel. Section K, page 2, requires the dealer, in the event he plans a special sale other than those promoted by Carvel, to secure permission "to sell merchandise at a price below the standard permitted". Page 9 of Section K prohibits the sale of Christmas trees or any other merchandise not approved by Carvel. Section M, Equipment Specifications, specifies the use of the front head and decorator tip Patent #D167443 (front plate assembly) and refrigerated front display case, Patent #D170003, both Carvel patents.

The Carvel-supplier contracts

a. Hood (Pl. Ex. 10, R. 252, 3186)

Hood delivers mix to Carvel stores in Massachusetts and Connecticut.[5] The contract of May 14, 1956 required Carvel to purchase all its requirements of mix from Hood in said area. Hood also agreed to deliver *only* Carvel mix to the Carvel stores, and no other mix or ice cream preparation of any kind. Hood invoices the stores on Carvel bill forms, at prices fixed by Carvel, makes collections for Carvel and follows Carvel's instructions concerning credit advanced to each dealer.

b. Rakestraw (Pl. Ex. 15, R. 337, 3204, 5)

Rakestraw delivers mix to Carvel stores in Pennsylvania.[6] Its agreements with Carvel are substantially identical with the Hood agreements.

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[5] Hood is named as defendant in the Susser, Modick, McCoy, Ossola, Phelan and Seu cases.

[6] Rakestraw is named as defendant in the Pierce, Giberman and Pazdro actions.

c. Eagle Cone (Pl. Ex. 11, R. 264, 3186, 7)

Carvel agreed to purchase all its requirements of cones from Eagle in the tri-state area of New York, Connecticut and Massachusetts.[7] The agreement called for cones of a specific design only for Carvel and for no other person. Eagle also billed the dealers on Carvel bill forms at prices agreed upon by Carvel and Eagle.

Concerning the price maintenance aspect of the case, plaintiffs' proof consisted exclusively of documentary evidence, all of which originated from Carvel. The early franchise (Ex. 1, pars. 4(x) [R. 227] and 29 [R. 237]) imposed a price maintenance policy upon the dealers. Carvel's Ex. C-1B (R. 283, 3514) purported to permit dealers to unilaterally fix resale prices. Vettel testified that subsequent to the adoption of the later franchise (Pl. Ex. 2), Carvel supplied dealers with advertising posters containing alternate prices (R. 162) and also supplied posters with blank spaces for prices (R. 162, 3). Plaintiffs' exhibits however, emanating from Carvel during the same period, reflect a determined effort by Carvel to compel adherence by its dealers to a policy of resale price maintenance.

The District Court ruled that the validity of the franchise agreements should be judged in the light of the principle relating to protection of trade marks and found that no *per se* illegality had been established and that the restrictions were within the permissible limits of *F.T.C.* v. *Sinclair Refining Co.*, 261 U. S. 463. The Court did find a price-fixing violation with respect to the four plaintiffs under the earlier franchise but found no price fixing arrangement subsequent to the adoption of the new franchise and the dissemination by Carvel of Ex. C-1B.

While the Court of Appeals affirmed the District Court, Chief Judge Lumbard held that plaintiffs had proved the

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[7] Eagle Cone is named as defendant in the Susser, Modick, McCoy, Ossola, Phelan and Seu cases.

essentials of an unlawful tying agreement through the use of the Carvel trade marks as the principal feature of the franchise system furnishing the requisite economic leverage. The majority, however, held that no unlawful tie-in had been established, that the amount of commerce involved was inconsequential and any damage to the plaintiffs even less so.[8] The Court found the evidence on price maintenance to be contradictory and therefore sustained the District Court. It also ruled that the exclusive dealing and restrictive provisions of the franchise were reasonably necessary to protect Carvel's good will.

Summary of Argument

I

As understood today, *per se* offenses are those restraints "which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use." *Northern Pacific Railway Co.* v. *United States*, 356 U. S. 1, 5, 78 S. Ct. 514. The *per se* concept, as opposed to the rule of reason, is essentially an evidentiary one delimiting the extent of proof necessary for a plaintiff to prevail. It obviates any inquiry into competitive effect. It requires only a finding of a particular act, practice, agreement or arrangement. The defendant is limited to challenging that fact alone.

This principle of *per se* unreasonableness thus "avoids the necessity for an incredibly complicated and prolonged economic investigation into the entire history of the industry involved, as well as related industries, in an effort

[8] The trial actually proceeded on the issue of liability alone with the question of damages reserved for a future trial if plaintiffs prevailed. No effort was made to prove damages.

to determine at large whether a particular restraint has been unreasonable—an inquiry so often wholly fruitless when undertaken." *Northern Pacific Railway Co.* v. *United States,* 356 U. S. 1, 5, 78 S. Ct. 514.

In essence, the *per se* doctrine results after a cumulative series of rulings, adverse to a particular practice, so that the courts take judicial notice that its effect is to substantially restrain trade, and thereupon indulge in a presumption that the sole intent underlying the practice is to achieve such an anti-competitive effect.

II

The Carvel system of operation involves the sale, loan or lease of patented and unpatented equipment as well as the use of trademarks, on condition that the dealer use same only in conjunction with Carvel mix and other equipment and supplies required to be purchased from Carvel, and no other. Such agreements constitute *per se* violations of § 1 of the Sherman Act when the party imposing the condition has a dominant position with respect to the tying product and a not insubstantial volume of interstate commerce is affected. *Northern Pacific Railway Company* v. *U. S.* 356 U. S. 1, 78 S. Ct. 514.

The *Northern Pacific Railway Company* case defined "monopoly power" or "dominance" over the tying product as nothing more than "sufficient economic power to impose an appreciable restraint on free competition in the tied product" (pp. 11, 521). And it is established that a patent is sufficient to supply the requisite of "dominance" for the application of the *per se* rule of unreasonableness to tying arrangements.

Assuming, as the concurring opinion in the Court of Appeals stated, that the patented items involved "cannot realistically be considered the 'tying product' or the focus of the arrangement", it is urged that the use of the Carvel trademark, found by Judge Lumbard to be the "principal

feature of the Carvel franchise system", supplies the requisite economic power which this Court defined in the *Northern Pacific Railway* case. Nor can a license to use a trade name sanction unlawful restraints such as are here involved. *Dictograph Products, Inc.* v. *F. T. C.*, 217 F. 2d 821 (2 Cir.). And this Court has earlier held that a valid trademark licensing system may not be implemented by restraints of trade which extend beyond protection of the mark. *Timken Roller Bearing Co.* v. *U. S.*, 341 U. S. 593, 71 S. Ct. 971.

The protection of good will or the compulsion of contractual obligations cannot justify proscribed tying arrangements. *United States* v. *Loew's, Incorporated*, 371 U. S. 38, 83 S. Ct., 97, *International Salt Co., Inc.* v. *United States*, 6 F. R. D. 302 (S. D. N. Y.), aff'd 332 U. S. 392, 68 S. Ct. 12. The Carvel mark could be lawfully and sufficiently protected through definition of standards for the different products used. While Vettel testified that this was not done because it would be "impossible to police it" (R. 41), the fact remains that Carvel maintained an extensive supervisory system policing every facet of the dealer's operation (Pl. Ex. 76, R. 413, 414, 3384). Carvel failed to prove that quality control and avoidance of public deception could not be accomplished by methods other than anti-competitive restraints.

The District Court found that it would be an unreasonable burden to require Carvel to furnish its dealers with specifications of standards for products (R. 59). No evidence supports this except Vettel's testimony that it would be "impossible to police it". But Vettel also testified that Carvel does furnish such information to its many suppliers (R. 196-200). Conceivably, if such details can be given the supplier, they can be given the dealer. The Court also found that "the agreements indicate that Carvel would approve the use of accessory supplies from alternate sources of supply if an adequate check on standards could be main-

tained" (R. 59). The agreements not only contain no such provision, but Vettel's testimony effectively negated this conclusion (R. 41).

It is thus clear that the patented equipment and devices, the trade marks, and the exclusive ownership of "a unique system for the production, creation, sale and distribution at retail, of Carvel's Frozen Dairy Products" (Pl. Ex. 1, R. 208), cloak Carvel with the mantle of dominance requisite to a proscribed tying agreement.

The concurring opinion, in arguing that plaintiffs had failed to prove that "a not insubstantial amount of commerce is affected", stressed that in New York, Connecticut and Massachusetts there were "250 Carvel dealers out of a total of 125,000 outlets where ice cream cones could be purchased—amounting to one fifth of one percent of the outlets and apparently doing about one percent of the business" (R. 451). This overlooks repeated holdings that industry wide economic data need not be shown in a *per se* case nor is it necessary to prove, through voluminous economic statistics, that the public generally has been injured. *Northern Pacific Railway Co.* v. *United States, supra.* Moreoever, Carvel itself did not engage in the manufacture and sale of ice cream. Carvel competed, not with ice cream stores or manufacturers of ice cream, but with suppliers of machinery, equipment, ingredients and supplies to those engaged in the manufacture and retail sale of soft ice cream. The District Court found that Carvel's volume of business was substantial (R. 20, 29) and since that business is foreclosed to competitors by Carvel's restrictive agreements, it follows that "a not insubstantial amount of commerce is affected".

III

The record is clear that the Carvel franchise is an exclusive dealing, all requirements contract. Generally such contracts have not been ruled illegal *per se. Tampa Electric Company* v. *Nashville Coal Co.*, 365 U. S. 320, 81 S. Ct. 623.

But the exceptions noted in the *Tampa* case preclude application of the general rule and dictate that the agreements here involved meet the standard of *per se* illegality.

The fact that the stores may be of uniform design is not controlling. There is no evidence in the record of the public's association of a Carvel store as one where *only* Carvel products are sold. The Court can take judicial notice that many types of stores display uniform signs and have uniform appearances, yet deal in products other than those indicated by the signs.[9]

We agree with Judge Lumbard that the antitrust laws do not "proscribe a trademark owner from establishing a chain of outlets uniform in appearance and operation" (R. 448). But that right cannot be expanded to immunize the unlawful extension of a trademark to validate antitrust activity under the guise of goodwill protection. For it is basic that every anticompetitive practice condemned by the antitrust laws is designed, primarily, to enhance the goodwill of the product or business involved. The cases cited by Judge Lumbard are easily distinguishable (R. 448). They do not reflect, as does this case, that the underlying and perhaps sole purpose of the agreements was to restrain and foreclose competition.

Thus, the agreements under consideration can have no other result than an adverse effect upon competition. And since a substantial number of outlets and a substantial number of products, *whether considered comparatively* or not, are involved, the requirement of showing a lessening of competition has been met. *United States* v. *Standard Oil Co., of California,* 78 F. Supp. 850 (DC Cal).

When considered not as an independent act standing alone and divorced from other suspect activities, but as an integral part of the web of illegality spun by Carvel, and as an ally implementing the pattern of proscribed behavior,

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[9] Rexall Drug Stores, for example.

these agreements become indelibly colored with *per se* illegality. It is obvious that the franchise effectively forecloses other suppliers from dealing with Carvel stores. Thus, as this Court said in the *Standard Stations* case [10] (pages 314, 1062),

> "the qualifying clause of § 3 is satisfied by proof that competition has been foreclosed in a substantial share of the line of commerce affected. It cannot be gainsaid that observance by a dealer of his requirements contract with Standard does effectively foreclose whatever opportunity there might be for competing suppliers to attract his patronage * * * "

IV

By the terms of their contracts with Carvel (Pl. Ex. 10, R. 252, 3186; Ex. 11, R. 264, 3186-7; Ex. 15, R. 337, 3204), the supplier defendants are obliged to refrain from dealing with the Carvel store owners. The Hood (Ex. 10) and Rakestraw's (Ex. 15) agreements (par. 5 [f]) require such dairies to deliver "only Carvel Mix to Carvel stores, and no other ice cream mix or ice cream preparation of any kind." These agreements also call for all of Carvel's requirements.

It must be concluded that the supplier defendants were aware that the Carvel dealer was an independent business man. The agreements required these defendants to drop ship to each store and to bill the store on Carvel invoice forms (D. Exs. H-5, R. 326, 3553-4; H-6, R. 327, 3554; and H-7, R. 328, 3555-6). The suppliers were also required to collect from each dealer and to remit to Carvel. In such a situation, the agreements to sell Carvel all of *its* requirements when, obviously, the requirements were those of the independently owned stores, necessarily imputes to these defendants a knowledge and awareness of the restrictive provisions of the Carvel-dealer agreements.

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[10] *Standard Oil of California* v. *United States*, 337 U. S. 293, 69 S. Ct. 1051.

It follows, therefore, that the Carvel-supplier contracts constituted boycott agreements whereby the supplier defendants each agreed to refrain from direct selling to the store owners. Thus, they precluded the dealers from all products except those specified by Carvel and they restricted trade between the dealers and suppliers even in the specified products. Such agreements constitute *per se* violations of the antitrust laws. *Klors, Inc.* v. *Broadway-Hale Stores, Inc.*, 359 U. S. 207, 79 S. Ct. 705; *Kiefer-Stewart Co.* v. *Joseph E. Seagram & Sons, Inc.*, 340 U. S. 211, 71 S. Ct. 259.

V

It is elementary that price fixing is a per se violation of Section 1 of the Sherman Act. It is equally elementary that proof of illegal price maintenance needs no specific agreement but may be shown by Carvel's policy and methods in securing the cooperation of its dealers. *Federal Trade Commission* v. *Beech-Nut Packing Co.*, 257 U. S. 441, 42 S. Ct. 150.

It is undisputed that the early franchise (par. 4 [x] of Pl. Ex. 2 establishes a per se violation. The dispute here centers about Carvel's practices subsequent to the sending of D. Ex. C-1B (R. 283, 3514) in February of 1956. In this area, plaintiffs' proof was based on communications emanating exclusively from Carvel which effectively negate the change in policy stated in Ex. C-1B.

Thus, the post-1955 Standard Operating Procedure Manual (SOP) (Pl. Ex. 8A, R. 15) makes several references to "Standard selling price". Pl. Ex. 40 (R. 379, 3281) required maintenance of a 10 and 20 cent price "as recommended in the SOP", Pl. Ex. 41 (R. 381, 3281) threatened termination of franchise for sales "at wholesale prices". Pl. Ex. 42 (R. 275, 3283) requested advance notice of special sales "so that we may approve them". The franchise and SOP require use of only Carvel approved advertising material and signs which are furnished by Carvel with

prices printed thereon (Pl. Ex. 39, 3278-80)[11]. To insure that such advertising material was used, no credit was given for cooperative advertising unless same was approved by Carvel *prior* to publication. Carvel further prohibited dealers from using the Carvel name in connection with signs of price changes.

The clear policy was to maintain a level of prices. Thus, when Carvel gave permission for special sales, it insisted upon notifying neighboring stores so that they could participate therein. The board of governors, a body of dealers appointed by Carvel, makes "recommendations for the change in the recommended level of price changes" (R. 35). Other letters indicate that despite Vettel's testimony to the contrary, Carvel did not have signs "without recommended prices". The evidence further reveals that Carvel inspectors reported dealers' price deviations to Carvel.

The record is clear that following the revision of the early franchise, Carvel successfully continued a policy designed at maintaining a level of prices. The proof clearly warrants such a presumption which cannot be rebutted by self-serving statements but only by evidence of actual sales at other than the suggested prices.

The court of appeals held that the evidence on price-fixing was contradictory (R. 436). But the fact is that the contradiction consisted of Carvel contradicting itself. Plaintiffs' evidence was exclusively derived from Carvel letters and other documents. The contradiction mentioned by Judge Lumbard arose when Carvel sought to avoid the clear implications of its own documents. This is not such a contradiction as creates a factual issue the determination of which will not be reviewed on appeal.

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[11] This exhibit was brought to court pursuant to Rule 38.

VI

We submit that the Carvel system is revealed as a vast, interrelated scheme whose only purpose and effect is to restrain competition. Every aspect of the Carvel operation is an integral part of that plan. The intent underling it stands out in bold relief under the cold light of analytical scrutiny. The alleged justifications of business convenience or protection of goodwill are exposed as sham.

We have here classic tying agreements and exclusive dealing arrangements which are implemented by the restrictive agreements with the suppliers. Further implementation is found in the land lease which is conditioned upon compliance with the franchise, and the conditional reassignment of the lease as security for the dealer's adherence to the terms of the franchise. The franchise prohibits the dealer from operating a competing business anywhere else and unreasonably restricts his ability to engage in business upon termination of the franchise despite the obvious fact that, upon termination, he could no longer use the Carvel name and therefore could not damage the trademark.

The contractual requirement that *only* Carvel signs and trademarks be used in or about the premises foreclosed the dealer from acquiring products from competitors of Carvel and indicating to the public by appropriate signs that such products offered for sale were not Carvel products.

The proper function of a trademark is to indicate the origin or ownership of the goods to which it is affixed. Yet the products sold to the consuming public were manufactured by the dealer; they were not Carvel's products nor did they originate from Carvel. We do not dispute Carvel's right to protect its trademark, insofar as lawfully possible, and to prevent deception through violation of the trademark. We do not dispute the propriety of Carvel's desire

that its dealers carry high quality products. But it is conceded that there are competing brands of comparable quality to that supplied by Carvel. Thus, the restraints imposed by Carvel go far beyond the pale of legality and have for their obvious purpose a clearly defined and unlawful restraint of trade.

ARGUMENT

I

The Carvel-dealer contracts constitute unlawful tying agreements in violation of § 3 of the Clayton Act and § 1 of the Sherman Act.

Tying contracts are condemned because their terms exclude other sellers from the market that would otherwise exist. *Black* v. *Magnolia Liquor Company*, 355 U. S. 24, 78 S. Ct. 106. In *Times-Picayune Pub. Co.* v. *U. S.*, 345 U. S. 594, 605, 73 S. Ct. 872, 878, this Court said:

> "Tying arrangements, we may readily agree, flout the Sherman Act's policy that competition rules the marts of trade. * * * Yet tying agreements serve hardly any purpose beyond the suppression of competition. * * * By conditioning his sale on the purchase of another, a seller coerces the abdication of buyers' independent judgment as to the 'tied' product's merits and insulates it from the competitive stresses of the open market."

A tying arrangement has been defined by this Court as "an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product, or at least agrees that he will not purchase that product from any other supplier".[12] And it is firmly established that when the sale of an unpatented product is tied to a patented one, a *per se* violation occurs

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[12] *Northern Pacific Railway Co.* v. *United States*, 356 U. S. 1, 5, 6, 78 S. Ct. 514, 518.

since "it is a bald effort to enlarge the monopoly of the patent beyond its terms". *White Motor Company* v. *United States*, 372 U. S. 253, 259, 83 S. Ct. 696, 700.

Under the early franchise, Carvel granted the dealer the right to use the Carvel name, sold him the patented display case and patented freezer of which it was the exclusive distributor and which could only be used in conjunction with its patented Front Assembly Plate (see SOP Equipment Specifications), loaned him (for a rental fee) the patented Front Assembly Plate, special building signs and insignia, and required him to construct a store in accordance with its patented building design and exclusive plans and specifications, only upon his agreement to buy only Carvel Special Formula Mix, to purchase from Carvel all equipment necessary for the operation of his store, to purchase from Carvel all paper goods, ingredients and other supplies, and to sell no frozen product other than that processed from Carvel mix through Carvel freezers.

The later franchise ostensibly, but not in practice, modified the foregoing restrictions only in two areas; by requiring the dealer to equip his store and keep it maintained "in accordance with the specifications contained in the Manual". These specifications (Section M of the SOP) provide, *inter alia*, that the Ice Cream Freezer have Carvel's patented Front Assembly Plate, and that the Refrigerated Front Display Case be that patented by Carvel. The dealer is also ostensibly permitted to purchase printed paper goods from sources other than Carvel but only on condition that Carvel license such other source to print the Carvel name on such paper goods and to manufacture them "in accordance with Carvel standards". This authority is purely illusory since no adequate specifications or standards are published by Carvel which competitors can follow in order to satisfy Carvel's requirement.

The Equipment Sales Contract used in conjunction with the later franchise provides that the Front Plate Assembly, which is not sold to the dealer, may be used only in compliance with the terms of the franchise which requires the dealer to purchase mix, all ingredients and supplies only from Carvel, and binds him to sell only Carvel's Frozen Dairy Product "solely in accordance with the Manual" and to sell no other product. Pertinent provisions of the Manual are as follows:

Section B, entitled "General Operation: Preface",

> "2. It is the Dealer's responsibility to devote the store and the premises solely to the display of equipment and conforming to Carvel specifications, point of sale materials and to the sale of Carvel frozen dairy products and for no other purpose."

Sections H and I, Supply Division and Allied Equipment, contain lists of Commissary Supplies which "must be purchased through your Carvel Merchandising Division", and of Allied Equipment which "is available through your Carvel Merchandising Division. Items to the specifications of these items must be used in the operation of your store." It is significant that no specifications are given and thus, in effect, the dealer must purchase these items from Carvel.

Carvel Exhibit C-2 (R. 155, 3485)[13] discloses the following patented equipment: front plate assembly, roof crown, combined service and display counter, combination freezer and dispenser, agitating and scraping mechanism for use in ice cream freezing chambers, and apparatus for agitating and dispensing frozen foods. It is these articles that are sold and leased to the dealer upon the condition that they shall be used only with the other goods supplied by Carvel. It is to be noted that the revised franchise and SOP did not change this condition. Nor did the letter of

[13] This exhibit was brought to Court pursuant to Rule 38.

February 27, 1956, Exhibit C-1B, affect the dealers under the early franchise who had been required to purchase their equipment from Carvel.

The early franchise, as well as the loan agreement provide that the front plate assembly, signs and other equipment therein specified, are loaned to the dealer only for use in connection with the franchise and for so long as he complied with its terms. The front plate assembly, it should be explained, is the dispensing part of the freezer and gives to the ice cream the distinctive swirl effect. It is covered by a Carvel patent, is not made by any other supplier, and must be used with the equipment in the Carvel store (R. 34). In addition, the pre-1955 equipment sales contract (Pl. Ex. 3, R. 349, 3154) provides on its reverse side:

> "It is specifically understood and agreed that the above equipment is sold subject to Franchise Contract • • • and to be used only in conjunction with Franchise Contract • • •."

The later franchise requires the dealer to equip his store and maintain it "in accordance with the specifications contained in the Manual" (Ex. 8A). Although the franchise seemingly gives the dealer the right to acquire his equipment from non-Carvel sources, this right is illusory. For the SOP specifications provide, *inter alia*, that the ice cream freezer be equipped with Carvel's patented front assembly plate (Section M, item I) and that the refrigerated front display case be that patented by Carvel (Section M, item IX). The equipment sales contract (Pl. Ex. 4, R. 239, 3156) provides that the loan of the front assembly plate is conditioned on its use only in compliance with the terms of the franchise which, it has been shown, requires the dealer to purchase mix, ingredients and supplies only from Carvel, to sell only Carvel's frozen dairy product "solely in accordance with the Manual" and to sell no other product.

The signs and special equipment lease (Pl. Ex. 6, R. 242, 3158) grants the use of the front assembly plate, the

patented roof crown and other signs, conditioned upon the dealer's compliance with the terms of his store lease which, in turn, is conditioned upon his compliance with the franchise. And the provisions of Section B of the SOP require the store to display only equipment conforming to Carvel specifications and to sell only Carvel products.

Concerning paper goods, Section H of the later Manual lists required paper goods supplies, accompanied by the statement, "Items to the specifications of these items must be used in the service of Carvel Products". Examination reveals a complete absence of specifications. The dealer is thus afforded no opportunity to avail himself of the supposed freedom of choice purportedly granted by the later franchise. Vettel, in fact, testified that although there are other suppliers selling paper goods of similar quality, Carvel has *never* furnished any dealer with the required and apparently secret specifications necessary to meet its standards (R. 41).

It is thus clear that the Carvel system of operation involves the sale, loan or lease of patented and unpatented equipment on condition that the dealer use same only in conjunction with Carvel Special Formula Mix and other equipment and supplies required to be purchased from Carvel, and no other. Such agreements constitute *per se* violations of § 1 of the Sherman Act when the party imposing the condition has a dominant position with respect to the tying product and a not insubstantial volume of interstate commerce is affected. *Northern Pacific Railway Company* v. *U. S.*, 356 U. S. 1, 78 S. Ct. 514; *International Salt Co.* v. *U. S.*, 332 U. S. 392, 68 S. Ct. 12.

The *Northern Pacific Railway Company* case defined "monopoly power" or "dominance" over the tying product as nothing more than "sufficient economic power to impose an appreciable restraint on free competition in the tied product" (pp. 11, 521). And it is established that a patent is sufficient to supply the requisite of "dominance" for the application of the *per se* rule of unreasonableness

to tying arrangements. *Standard Oil of California* v. *U. S.*, 337 U. S. 293, 307, 69 S. Ct. 1051, 1059, the court saying:

> "A patent, * * * although in fact there may be many competing substitutes for the patented article, is at least prima facie evidence of (market) control."

The trial court found that there was no evidence that Carvel had the dominance required for a tying arrangement (R. 59) and the concurring opinion in the Court of Appeals held that "the patented items cannot realistically be considered the 'tying product' or the focus of the arrangement" (R. 452). The fact is that Carvel considers its patented freezer as a vital part of the franchise transaction (R. 42), producing them exclusively for franchised stores and none other. And the importance placed by Carvel on the patented front plate assembly, which gives the product the distinctive Carvel swirl effect, is underlined by the fact that Carvel will not part with title to it but merely leases it to the dealer (R. 34).

Judge Lumbard found that Carvel possessed the requisite economic leverage from "the use of the Carvel trademark as the principal feature of the Carvel franchising system" (R. 441). The same rationale that implies sufficiency of economic power from use of a patent or copyright in a tying arrangement applies with equal force to a trademark.

Moreover, this Court recently held in *United States* v. *Loew's Incorporated*, 371 U. S. 38, 83 S. Ct. 97, that the requisite economic power may be found on the basis of either uniqueness or consumer appeal. These attributes are claimed by Carvel in the Preamble to the later franchise (Pl. Ex. 1, R. 208, 3144-46). The patented equipment available only to franchisees, the uniform store constructed in accordance with a design patent, the uniform products manufactured from a secret formula mix, all contribute to

create an "uniqueness" as described by this Court in the *Loew's* case.

The concurring opinion quoted this Court's statement in *White Motor Co.* v. *United States*, 372 U. S. 253, 262, 83 S. Ct. 693, 701 to the effect that tying arrangements "may fall" in the category of *per se* violations, "though not necessarily so." (R. 450). We believe the concurring opinion misunderstood such statement. As used in the *White* case, we feel that the statement was made in the context of this Court's review of *per se* violations in the *Northern Pacific Railway* case where the Court merely demonstrated by illustration that a *de minimis* restraint on competition would not constitute an unlawful tie-in.

The trial court held that "the restrictions imposed by Carvel fall within the permissible limits approved in *FTC* v. *Sinclair Refining Co.*, 261 U. S. 463 (1923)". He further supported his position with *Pick Mfg. Co.* v. *General Motors Corp.*, 80 F. 2d 641, (7 Cir.) aff'd *per curiam*, 299 U. S. 3 (R. 58, 9). Neither case is applicable to the facts here presented.

The *Sinclair* case involved the lease of gasoline pumps and storage tanks on condition that the dealer would use them only for Sinclair's gasoline, but Sinclair did not own patents on the pumps or tanks or otherwise control their supply. Under the restriction there involved, the dealer could lease as many tanks and pumps from as many different companies as he desired and purchase their gasoline and other products. The court pointed out (261 U. S. at p. 475), that

> "The lessee is free to buy wherever he chooses; he may freely accept and use as many pumps as he wishes and may discontinue any or all of them. He may carry on business as his judgment dictates and his means permit, save only that he cannot use the lessor's equipment for dispensing another brand. • • • He can have respondent's gasoline, with the pump or without the pump, and many competitors seek to supply his needs."

The *Pick* case involved an agreement to use only General Motors parts in the repair of General Motors vehicles, but there was no restriction against the purchase, use and sale of parts acquired from others so long as they were not used in the repair of a General Motors vehicle.

The Court of Appeals also relied upon the *Pick* case as well as *Dennison Mattress Factory* v. *The Spring-Air Co.*, 308 F. 2d 403 (5 Cir.). The conditions of these cases do not obtain here. The Carvel dealer can use only Carvel mix with his equipment; he cannot sell any ice cream not made from Carvel mix; he must purchase all supplies and ingredients from Carvel; he cannot acquire equipment from sources other than Carvel, and he cannot sell any product of any kind not approved by Carvel. Even with this clear distinction, the principle of the *Sinclair* and *Pick* cases was rejected by the Supreme Court in the *Standards Stations* case (337 U. S. 293, 69 S. Ct. 1051). It was also pointed out in *U. S.* v. *American Linen Supply Company*, 141 F. Supp. 105, 111 (D. C. Ill.) that

> "the consideration of preserving good will that justified the Sinclair leasing arrangements * * * has been expressly rejected by the Supreme Court in two subsequent decisions in analogous circumstances."

In the *Spring-Air* case, Dennison manufactured and sold mattresses made under the Spring-Air trade mark. While certain restraints were imposed by the licensing agreement, Dennison was not prohibited from manufacturing and selling its private brand mattress. It was permitted to purchase materials for its private label from any source and was furnished with alternate sources of supply for material made under the trademark. Moreover, the license was cancellable by Dennison. By contrast, the Carvel dealer is restrained from purchasing non-Carvel material for the manufacture and sale of frozen dairy products even though they could be sold under a description that would not infringe the Carvel mark. The Spring-Air

license did not restrain competitors of Spring-Air or its suppliers from competing for Dennison's business. Additionally, Dennison was not bound irrevocably to the license but could withdraw at will without suffering severe financial privation.

The evidence disclosed that Carvel entered into the agreements under review with all of its 400 dealers in approximately nine states. Thus, the restrictive provisions and practices affected all of Carvel's sales to its dealers of more than two million gallons of mix annually (D. Ex. C-11, R. 317, 3500),[14] and total sales in excess of four million dollars (R. 29). In view of this, it is difficult to reconcile the findings of both courts below that plaintiffs had failed to prove that a not insubstantial volume of commerce was affected. It is likely that such findings rested upon the proportion foreclosed of total commerce in these products. But that, of course, is not the standard in a *per se* tying violation, for it would convert such cases to "rule of reason" cases with the requirement of public injury to be established by an industry wide investigation. The standard in *Northern Pacific* is a quantitative one. So long as the seller is of sufficient size to exert some power and the amount of commerce restrained is not insignificant, the standard is met.

Thus, this Court's observation in *Standard Stations*, 337 U. S. at page 305, 69 S. Ct. at page 1058, that "tying agreements serve hardly any purpose beyond the suppression of competition" applies with full force to the situation here involved. The perniciousness of the tie-in is increased by the fact that Carvel is not even in the business of selling some of the tied products, but employs its economic power in its area of activity to compel its dealers to do business with suppliers in unrelated industries under arrangements that yield Carvel extraneous revenues.

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[14] Exhibit C-11 reflects a total of 1,865,560 gallons for only five states in 1959. Carvel stores operated in at least nine states.

In a searching study on the subject of tie-ins (Turner, Validity of Tying Arrangements under the Antitrust Laws, 72 Harv. L. Rev. 50-75), Professor Turner concluded with the following statement:

> "I conclude that the following compulsory tying arrangements, on a showing that they involve a not insignificant amount of commerce, could reasonably be held illegal *without proof that the seller has economic power in the market for the tying product and without regard to possible justification*:
>
> 1. Tie-ins on sales to users in which:
>
> (a) The tying and tied products are different products, used in varying proportions by buyers; and
>
> (b) the buyer is unconditionally obligated to buy the tied product from the seller at the seller's price; * * *" (emphasis supplied).

It is clear that the foregoing conditions exist in this case.

II

The exclusive dealing contracts, as integral parts of the unlawful tie-in arrangements, are per se violations of the antitrust laws.

It is undisputed that the Carvel franchise requires the dealer to purchase all his requirements from Carvel and to refrain from using or selling any competitive or other goods. It is also undisputed that Carvel has actively enforced this portion of the franchise.

In common with the tying agreement, the exclusive dealing contract boasts the same unlawful element, the exclusion of rival sellers. *Nelligan* v. *Ford Motor Company*, 161 F. Supp. 738, (DC SC) aff'd 262 F. 2d 556, (4 Cir.) but the Sherman Act "rule of reason" cannot be utilized to validate transactions proscribed by § 3 of the Clayton Act.

Dictograph Products, Inc. v. *Federal Trade Commission,* 217 F. 2d 821 (2 Cir). Nor does the grant to the dealer of the right to use the name "Carvel" effect a waiver of the provisions of the Clayton Act. *Anchor Serum Company* v. *Federal Trade Commission,* 217 F. 2d 867 (7 Cir). In the latter case, the contract in issue provided that

> " * * * in further consideration of the use by the parties of the second part of the word 'Anchor' as a part of their name * * * the parties of the second part agree to purchase from the party of the first part all their requirements of products manufactured and/or distributed by the party of the first part * * * ."

In commenting on this contract, the court said (p. 873):

> "It would require a naive mind to conclude, as petitioner would have us do, that the agreements under consideration could result in other than an adverse effect upon competition."

The court further ruled that it is not necessary to show the actual impact which a "requirements" contract has on competition. It is sufficient if it possesses the potentiality to impede a substantial amount of competitive activity.

Similarly, the "all requirements" provisions of the Carvel supplier contracts brings them within the confines of proscribed exclusive dealing arrangements, for their practical effect precludes the use by Carvel of any competitor's supplies. *United Shoe Machinery Corp.* v. *U. S.,* 258 U. S. 451, 42 S. Ct. 363; *International Business Machines Corp.* v. *U. S.,* 298 U. S. 131, 56 S. Ct. 701.

We had relied heavily on the *Standard Stations* case in both lower courts. The Court of Appeals held that this Court had departed from the inflexible rule there established in *Tampa Electric Co.* v. *Nashville Co.,* 365 U. S. 320, 81 S. Ct. 623, stating that the latter case had erected certain criteria which we had failed to meet (R. 447).

We do not subscribe to this view. We view *Tampa* as applicable to the facts peculiar to it, or close parallels thereto. We feel that this Court itself defined the limitations of the criteria established in *Tampa* when it said (pages 334, 631):

> "There is here neither a seller with a dominant position in the market as in Standard Fashions, supra; nor myriad outlets with substantial sales volume, coupled with an industry-wide practice of relying upon exclusive contracts, as in Standard Oil, supra; nor a plainly restrictive tying arrangement as in International Salt, supra."

The plain implication is therefore, that if any of these conditions prevail, *Tampa* will not be applicable. And, we submit, under the circumstances of our case, *Tampa* is not applicable.

We return, then, to *Standard Stations*. This Court ruled that it was *not* necessary to show that competition had actually diminished. In words permeated with far-reaching and long range effect, it said (337 U. S. at page 311, 69 S. Ct. at page 1060):

> "We are dealing here with a particular form of agreement specified by § 3 and not with different arrangements, by way of integration or otherwise, that may tend to lessen competition. To interpret that section as requiring proof that competition has actually diminished would make its very explicitness a means of conferring immunity upon the practices which it singles out."

The court then went on to say (pp. 312, 1061):

> "It seems hardly likely that, having with one hand set up an express prohibition against a practice thought to be beyond the reach of the Sherman Act, Congress meant, with the other hand, to reestablish the necessity of meeting the same tests of detriment to the public interest as that Act had been interpreted as requiring."

Thus, the court concluded that (pp. 314, 1062):

> "the qualifying clause of § 3 is satisfied by proof that competition has been foreclosed in a substantial share of the line of commerce affected. It cannot be gainsaid that observance by a dealer of his requirements contract with Standard does effectively foreclose whatever opportunity there might be for competing suppliers to attract his patronage * * *."

We therefore find here restrictive tying agreements, coupled with exclusive dealing agreements involving a dominant seller and numerous outlets with substantial sales volume. As a result, competitors are shut out of the market by an agreement that limits it, not in terms of quality, but in terms of a particular vendor. And where the greater part of available outlets have been foreclosed to competitors by exclusive dealing contracts, the situation falls within the prohibitions of the Sherman Act. *Federal Trade Commission* v. *Motion Picture Advertising Service Co., Inc.*, 344 U. S. 392, 73 S. Ct. 361.

It follows, therefore, that the legal monopoly accorded the Carvel patents and trade marks cannot be expanded through unlawful restraints of trade or agreements which provide for Carvel's control of the use and sale of all products whether trademarked, patented or not. *Timken Roller Bearing Co.* v. *U. S.*, 341 U. S. 593, 71 S. Ct. 971; *U. S.* v. *Masonite Corporation*, 316 U. S. 265, 62 S. Ct. 1070. Nor does the fact that Carvel franchised stores display the Carvel trademark, signs or other insignia, permit Carvel to compel dealers to purchase exclusively all products from Carvel. *Englander Motors, Inc.* v. *Ford Motor Company*, 267 F. 2d 11 (6 Cir.).

There is no evidence in the record that the public associates a Carvel store as one where *only* Carvel products are sold. Despite the fact that the dealers in *Standard Stations* had uniform signs and uniform buildings, this Court refused to sustain the full requirement provision of

the contracts on the ground of possible deception of the public through display of the seller's trademark or trade name and the sale of products other than those acquired from the seller.

The Court may well take judicial notice of the operation of numerous types of stores, displaying uniform signs and having uniform store fronts, which deal not only in the products associated with the signs but in others as well.

The trial court sought to distinguish the facts here involved from the *Standard Stations* case (R. 61). In comparing the two, he referred to the requirement not to sell competing brands of ice cream and the prohibition against the sale of other products, "such as hamburgers and coffee", which are outside the competitive ice cream line. He stated that the "latter type of restriction was not involved in the *Standard Stations* case * * *." This was completely erroneous and prejudicial. Hamburgers and coffee never entered the case. The prohibition complained of banned the use of products allied to and part of "the competitive ice cream line", all of which are supplied by and required to be purchased from Carvel. Amongst plaintiffs' exhibits will be found #47 (R. 386, 3354) barring the use of an unauthorized soda machine, milk vending machine, selling unapproved soda beverage, using unauthorized paper cups; #52 (R. 278, 3358), barring the use of an unauthorized quart container; ##57 (R. 396, 3362), 58 (397, 3362) and 59 (R. 398, 3362), relating to unauthorized paper cups; #61 (R. 401, 3363), prohibiting unauthorized cakes, crackers and paper goods; #65 (R. 407, 3370), objecting to an unapproved cigarette machine; #66 (R. 408, 3371), barring an unauthorized soft drink bottle dispensing machine. The *Standard Stations* restriction concerned the purchase of tires, batteries and accessories from a designated source. It is clear, then, that the type of restriction with which we are confronted here is identical with that in the *Standard Stations* case. It is also clear that Carvel,

as the supplier of such goods, is competing with other suppliers. The conclusion that Carvel is not in the business of manufacturing ice cream, cones and napkins is not material. For that matter, Standard Oil was not in the business of manufacturing tires, batteries and accessories.

The trial court also sought a distinction in that the gasoline station dealers were independent contractors whereas the Carvel dealer functions "as an integral part of the entire Carvel operation" (R. 62). The fact is, and the record is clear, that the Carvel dealer is an independent business man. In addition, the court's statement concerning plaintiffs' failure to prove a relevant market is erroneous, for this was established (R. 30).

It seems clear that exclusive arrangements, such as are involved here, seriously interfere with competition in the channels of distribution. To the extent that a supplier blankets the market with outright exclusive arrangements or requirements contracts of excessive duration, the opportunity of rivals to compete is jeopardized and foreclosed. Whenever a seller, through preempting access to consuming markets, unduly restricts his rivals' opportunities to compete, the potential impairment of the competitive process or tendency to monopoly is readily apparent.

Congress enacted the Clayton Act to abort business practices having a reasonable probability of economic harm. Section 3 is an express condemnation of such practices demonstrably detrimental to competition regardless of countervailing considerations. While a business practice challenged under the Sherman Act could be absolved upon a showing of reasonable business purpose adapted to cope with peculiar economic conditions, exclusive arrangements were marked for illegality under the Clayton Act once the test of reasonably probable detriment to competition is met.

The trial court ruled that the prohibition of Section 3 was "not applicable to Carvel's restriction on the sale of goods outside the ice cream line since Carvel is not competing with such goods" (R. 61). We feel the trial court was in error in this view. The language of Section 3 does not make the prohibition against requiring a purchaser not to deal in the commodity of a competitor, "where the effect * * * may be to substantially lessen competition or tend to create a monopoly," one whose benefit is given *only* to competitors of the seller. Certainly the imposing of such a requirement upon a *purchaser* can be capable of injuring him in his business, from the lessening of competition on the monopoly it can create against him as to his purchasing of goods. The broad remedy afforded by 15 U. S. C. A. 15, giving *any person* injured as a result of an antitrust violation the right to seek damages, indicates that Section 3 was not intended to be limited to a specific class of persons.

III

Practical effects of the restraints.

There can be no question about the destructive effect upon competition of the various restraints. Pl. Exs. 16 (R. 351, 3206, 3227), 17 (R. 353, 3209), 18 (R. 354, 3211) and 19 (R. 356, 3211, 3326) graphically illustrate the treatment given to unapproved suppliers of mix, cones and other products who seek to do business with Carvel stores. The Court may note that the suppliers reflected in these exhibits are concerns of national reputation. It is hardly sensible that their products, widely accepted over the nation, could "dilute" the Carvel trademarks.

The dealers were constantly threatened for their use and sale of unauthorized equipment or goods. We have already mentioned Pl. Exs. 52, 57, 58, 59 and 61. Pl. Ex. 47 (R. 386, 3354) deals with unauthorized soda beverage, an

unauthorized beverage machine in the store, and an unauthorized milk vending machine maintained *outside* the store. Pl. Exs. 48 (R. 388, 3354) and 64 (R. 406, 3369) threaten termination of franchise for the unauthorized sale of Christmas trees on the premises (not in the store). Pl. Ex. 50 (R. 389, 3356) threatens termination not only for use of such products as potato chips and orange soda, but for unauthorized *electric lights* in the store. Pl. Ex. 51 (R. 391, 3357) also deals with the sale of unauthorized products, including Coca Cola. In this connection it seems pertinent that if the restrictions were intended solely to protect the trademark through a quality control system, it is difficult to see how the trademark could be jeopardized through the sale of a product such as Coca Cola which has become virtually a household word throughout the entire world.

Pl. Exs. 53 (R. 392, 3558), 55 (R. 394, 3359) and 57 (R. 396, 3362) threaten termination for use of unauthorized products and paper goods. Pl. Ex. 58 (R. 397, 3362) deems the use of an unapproved ten ounce cup a violation. Parenthetically, it is noted that control of the size of portions served can be utilized as part of a price maintenance policy. Similarly, Pl. Ex. 52 (R. 278, 3358) barred the use of a quart container. Pl. Ex. 59 (R. 398, 3362) deals with unapproved paper goods. Pl. Ex. 60 (R. 399, 3363) bars the use of unauthorized sodas and Pl. Ex. 61 (R. 401, 3363) threatens action for unapproved products, paper goods and window signs. It is interesting to note that this last letter bars the use of even unapproved paper goods with no name or the name of a different organization printed thereon. It is difficult to determine how the use of an unmarked paper container or one identifying a product with someone else could dilute the Carvel mark.

In Pl. Ex. 63 (R. 404, 3369) Carvel now approves the sale of *Carvel Cola* and *Carvel Root Beer*. The inference seems clear that the previous prohibition against the sale

of Coca Cola and other beverages was intended solely for anticompetitive reasons. But the permission to now sell Carvel Cola and Carvel Root Beer was conditioned upon their sale being subject to all of the conditions of the franchise (Pl. Ex. 80, R. 415, 3396).

Pl. Ex. 65 (R. 407, 3370) denies the use of a cigarette vending machine and Pl. Ex. 79 (R. 282, 3389) prohibits the sale of hot fudge sundaes. This does not involve unapproved goods; it is merely a particular item that has not received Carvel's approval.

The later franchise (Pl. Ex. 8A) ostensibly permits the purchase of paper products from other sources if they meet Carvel standards. D. Ex. C-1B (R. 283, 3514) purportedly gave this right to parties to the early franchise provided the paper goods met "the standards and specifications set forth in the Manual". The fact is that the Manual contains *no* specifications sufficiently adequate to enable a dealer to purchase paper goods from a supplier other than Carvel. The illustory nature of this option is demonstrated by Vettel's admission that Carvel has never supplied any dealer with its specifications for printed goods (R. 41).

The early franchise required all equipment to be purchased from Carvel whereas the later franchise gives the dealer the right to purchase elsewhere so long as the equipment is "in accordance with the specifications contained in the Manual" (Par. Ninth of Pl. Ex. 1). The letter of February 27, 1956 (D. Ex. C-1B) to parties to the earlier franchise extended to them that same apparent right. However, the specifications contained in the SOP include the Carvel patented freezer, display cabinet and front plate assembly. The first two can be purchased *only* from Carvel (R. 42) and the front plate can be leased *only* from Carvel and not otherwise acquired. Thus, despite the surface liberalization of the later franchise, the dealer is nevertheless still compelled to obtain his basic equipment from Carvel.

IV

Protection of the Carvel trademark does not justify the tying and exclusive dealing contracts.

Trademarks, unlike patents or copyrights, cannot be freely bought and sold. They can be assigned only in connection with the good will of the business in which the mark is used (Lanham Act).

It was said in *Ph. Schneider Brewing Co.* v. *Century Distilling Co.*, 107 F. 2d 699, 703 (10 Cir.) that

> "A trade-mark is a right appurtenant to a business or trade in connection with which the mark is employed. The right to a particular mark grows out of its use. Its function is to designate the goods as the product of a particular trader and to protect his good will against the sale of another's products as his."

In the light of the foregoing, it becomes important to examine the alleged Carvel trademarks and expose them to the light of day.

Analysis of the Carvel trademarks (Ex. C-2) reveals the following:

There are twenty alleged trademarks. Examination reveals that *all* have been issued to and are owned by Thomas Carvel. There is no evidence of any assignment or license to any of the Carvel corporations of any of the said trademarks. By the express terms of 15 U. S. C. A. 1060, an assignment *must* be in writing.

Moreover, of the twenty trade marks, four (Nos. 599,786; 647,627; 614,138 and 597,727) are on the supplemental register. 15 U. S. C. A. 1094 provides that where a trademark is registered on the supplemental register, the certificate is not *prima facie* evidence of ownership.

Further analysis reveals that three of the four trademarks on the supplemental register were registered more

than six years before the trial, as were four of the trademarks on the principal register (Nos. 550,082; 578,937; 567,263 and 544,880). Pursuant to the provisions of 15 U. S. C. A. 1058, a registration *shall* be canceled at the end of six years unless the registrant shall file an affidavit of continued use or reasons for nonuse, which affidavit must be accepted in writing by the Commissioner. No evidence has been offered to show approval by the Commissioner of the continued registration of these trademarks.

In addition, it is noted that two of the trademarks (Nos. 689,800 and 687,695) as well as three of the patents (Nos. 184,983; 184,037 and 185,131) are not only of recent vintage but pertain solely to mobile vehicles used in the retail sale of ice cream, and therefore have no relevancy to this action. Nine other trademarks on the principal register were registered in 1957 and subsequent thereto, or at a time *after* the execution of all of plaintiffs' franchises, as follows:

No. 716,227—May 30, 1961
No. 722,911—October 17, 1961
No. 716,302—June 16, 1961
No. 723,983—November 14, 1961
No. 677,440—April 21, 1959
No. 651,525—September 10, 1957
No. 651,524—September 10, 1957
No. 687,646—November 3, 1959
No. 668,451—October 14, 1958

Moreover, seven of the trademarks, Nos. 677,440; 651,525; 651,524; 687,646; 544,880; 621,412 and 668,451 relate to the registered names of specific products, such as Mamapalozza, Icy-Wycy, etc.

It is submitted that in the absence of proof of ownership of the marks, the defendants are debarred from asserting that the various restrictions and restraints are necessary for the protection of their trade marks. Moreover, aside from this deficiency, it has not been shown that the trademarks, or any of them, were transferred or licensed to the

defendant corporations as part of the business in which they had been utilized. The inference is plain that when Thomas Carvel obtained the trademarks, he did not obtain them in connection with *his* personally owned business, if any, the good will of which he wished to protect.

The protection of good-will and quality

It is well established that the protection of good will as justifying tying arrangements has been thoroughly rejected. *International Salt Co., Inc.* v. *U. S.*, 6 F. R. D. 302, 308, aff'd 332 U. S. 392, 68 S. Ct. 12; *International Business Machines Corporation* v. *U. S.*, 298 U. S. 131, 56 S. C. 701; *Dictograph Products, Inc.* v. *Federal Trade Commission*, 217 F. 2d 821 (2 Cir.) It was pointed out in the *IBM* case that there was no contention that other suppliers than IBM could not meet the requirement and, in fact, it affirmatively appeared that others were capable of manufacturing cards suitable for the IBM equipment and that paper for that purpose could be obtained by such other suppliers. In this connection, Vettel testified that toppings of the same quality were obtainable elsewhere (R. 40, 1) and that other suppliers produce paper goods of comparable quality (R. 41).

In the *International Salt* case, the Supreme Court held that the validity of a need for salt of high quality did not justify the tying arrangements for the licenses designated usable salt not by quality standards but by reference to the vendor. Similarly, assuming, *arguendo*, the need for prescribing and controlling the quality of Carvel products, the franchise and supplementary agreements designated usable mix, paper goods, ingredients and supplies not by quality standards but by reference to Carvel products only.

It may be argued that quality control of the ingredients of food products is important not only for the protection of good-will but for the protection of the public as well. Granting such need, as was said in *International Salt*, standards must be provided by the vendor. Vettel admitted

that dealers were never advised of specifications for flavorings or toppings; they were never advised they could purchase such products from others if Carvel specifications were met; and that Carvel, in fact, would not permit such practice (R. 41). It is to be noted, also that the specifications in the recipe section of the Manual refer merely to "Carvel Chocolate", "Carvel Coffee Extract", "Carvel Vanilla", "Carvel Crunched Peanuts," etc. No specifications or standards are given designating the functional characteristics, properties or quality of the materials which may be used.

Thus, the Carvel dealer has no choice. He is prohibited from purchasing elsewhere, even products of equal or in fact superior quality. He is given no choice of meeting standards imposed as part of a valid quality control. But Carvel has failed to establish a valid quality control. The evidence shows to the contrary. Vettel admitted that the dealer may in fact dilute the product by not freezing or mixing it properly or by not using proper ingredients or in the proper proportions, and that, in the final analysis, *the quality really depended on the man doing the job in the store* (R. 40). The nature of the business is thus such that as a practical matter it is impossible to control the quality of the end product by the restrictions imposed. It is thus clear that the restrictions imposed are actually designed to eliminate and suppress competition between Carvel and unapproved suppliers.

The orthodox definition of the function of a trademark is to identify the origin or ownership of the goods to which it is affixed. *Hanover Star Milling Co.* v. *Metcalf*, 240 U. S. 403, 412, 36 S. Ct. 357. And while a trademark licensor is obligated to exercise some control over its use by a licensee, the Lanham Act may require no more than sufficient control to avoid deception of the public as to the origin or quality of the trademarked product. (60 Stat. 429 (1946), 15 U. S. C. § 1055.) But Carvel failed to prove that quality control and prevention of public deception

could *not* be accomplished by methods other than those drastically restrictive of competition.

In fact, Carvel has admitted its inability to control quality, which concededly depends upon the integrity and skill of each dealer, and the fact that Carvel obligates the dealer to take out product liability insurance for its benefit (Pl. Exs. 1 and 2) is a tacit acceptance of the probability that the product manufactured by the dealer may be such as to endanger consumers and will not always be of uniform quality.

We feel that the evidence amply demonstrates that Carvel has no concern with protection of quality for legitimate reasons.

On page 3 of Section G of the SOP Manual Exhibits 8 and 8a, Carvel advises the dealer how to trick the Health Inspector by concealing mix with potentially high bacteria count. It is sufficient, without comment, to merely note that the same admonition does *not* caution the dealer against serving such product to the public.

The hypocrisy of Carvel's quality control claim is glaringly displayed in Pl. Ex. 76 (R. 413, 3384), especially that part of the supervisor's report to Carvel on the store's "Products Quality Control." It will be noted that points are allotted to various categories with deductions to be made for deficiencies. Examination reveals the following startling contrast:

	Item	*Deduction (Points)*
E. 5	Any unapproved commissary	75
F. 3	Any unapproved paper goods	40
G. 22	Any unapproved items sold	80
J. 1	Any unapproved Equipment	50
C. 2	Product Tasty	2
C. 3	Product Firm	2
I. 1	Freezers properly sterilized	10
I. 3	Utensils properly sterilized	10
I. 4	Adequate Sanitary Precautions	2 (Each Item)

It is crystal clear that notwithstanding its pious declarations, Carvel's primary concern in its relations with dealers it not the purity or quality of the ice cream products, but the restraints prohibiting the dealers from using unapproved paper goods, equipment, commissary or selling unapproved items. It cannot therefore be gainsaid that Carvel's restrictions are imposed for the primary purpose of eliminating competition and foreclosing the Carvel store market to competitive suppliers. Parenthetically, it should be noted that the Manual nowhere prescribed the use of only Carvel water.

Even were we to disregard the above described infirmities inherent in the alleged trademarks, these restraints cannot be justified. It was said in *Timken Roller Bearing Co.* v. *U. S.*, 341 U. S. 593, 598, 71 S. Ct. 971, 975,

> "Nor can the restraints of trade be justified as reasonable steps taken to implement a valid trademark licensing system, even if we assume with appellant that it is the owner of the trademark 'Timken'. * * * Furthermore, while a trademark merely affords protection to a name, the agreements in the present case went far beyond protection of the name 'Timken' * * *."

Moreover, Carvel cannot argue that it must protect the quality of the product in order to avoid litigation because the dealer is required to carry $100/300,000 products liability insurance (Exs. 1 and 2). In addition, as Vettel and Simonson admitted, each State in which Carvel stores operate regulates and controls the contents of ice cream mix by law, and the store owners, as manufacturers of the end product, must be licensed by the state (D. Ex. E-7, R. 420, 3482) and are directly under the supervision and subject to the inspection and control of the Department of Health having jurisdiction. Thus, Carvel is adequately protected against quality dilution.

Since there is no evidence in the record that Thomas Carvel is himself engaged in the retail sale of Carvel ice

cream, defendants cannot argue that the restriction in the franchise agreements granted by the Carvel corporate organizations are necessary to protect *his* good will in the trademark or trade name "Carvel." Moreover, the fact that Thomas Carvel, on the record, is still the sole owner of the Carvel trademark, bars the corporate defendants from claiming rights under the Carvel trademarks in reliance on the fact that Thomas Carvel is a stockholder especially since the Court has dismissed plaintiffs' claims against him on the ground that he was in no way involved in these proceedings.

In *Ethyl Gasoline Corp.* v. *U. S.*, 309 U. S. 436, 459, 460, 60 S. Ct. 618, 626-7, the contention that unlawful restrictive agreements were necessary to protect the health of the public was rejected, the court holding that adequate protection could be effected without recourse to licensing devices capable of being used "for other and illicit purposes".

The record fails to support the court's conclusion that it would be impractical and burdensome for Carvel to furnish specifications of standards to its dealers. The uncontradicted evidence discloses that Carvel did furnish detailed specifications, standards and formulas to its suppliers (Exs. 10, 11, and 15, R. 196, 7). Since such material had already been prepared by Carvel, it could have been readily supplied to the dealers as a guide in the manufacture of the ice cream products. Or Carvel could have designated a number of approved suppliers with the dealer being free to deal and bargain with any of them.[15]

Nor would this impose an unreasonable burden of policing, as the court stated. Carvel maintains an extensive policing organization with myriad details to check on and supervise. Examination of Pl. Ex. 76 (R. 413, 3384) confirms this.

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[15] See *Engbrecht* v. *Dairy Queen Company of Mexico, Missouri*, 203 F. Supp. 714.

Carvel, without unreasonably suppressing competition, could have as effectively protected the goodwill in the trade marks by exercising all rights inherent therein. The agreements could have specifically warned the licensees that the purchase or use of any product, puchased from others, not made in accordance with Carvel specifications and standards would subject the licensee to infringement suits, injunctive proceedings and damages, as well as cancellation. *International Business Machine Corporation* v. *United States*, 298 U. S. 131, 56 S. Ct. 701. Instead of refusing to divulge such specifications or standards, it could have been ready and willing to disclose them to any supplier from whom a licensee wished to purchase, providing such supplier would agree to comply with the specifications and permit the product to be checked before delivery to the licensee. Such practice would dispose of the objections of both the trial court and the Court of Appeals to the impracticability of policing 400 dealers. Carvel, as the record reveals, does require its suppliers to comply with its specifications and would experience no difficulty in doing so under the conditions herein suggested.

It could have provided that should the dealer manufacture and sell ice cream not made in accordance with Carvel specifications and standards, such ice cream must either be sold under a different mark or name or the purchaser must be affirmatively informed that it is not Carvel ice cream. It could warn the dealers that to give a customer a competitive ice cream when the customer specifically requests Carvel ice cream would be regarded as a breach of the agreement.

Under the existing agreements the dealers may not only have their license cancelled if they breach any of the provisions but may also, by operation under the pre-1955 agreement, lose the Carvel freezers and the lease to their store and under the later agreement, lose their lease. If only the loss of the license to use the trade mark was involved, the dealers could exercise their freedom of choice of supplier

and with the retention of their facilities enter into a competing frozen dairy product business under a different mark and name. On the other hand, if the Carvel name and trade mark is really a valuable asset, the licensees would willingly comply with the recommended reasonable restrictions and Carvel would retain its goodwill.

V

Pursuant to agreement with Carvel, the supplier defendants are obliged to refrain from dealing with or selling to plaintiffs.

Hood Contracts (Pl. Ex. 10, R. 252, 3186).

On May 14, 1956, Hood entered into identical agreements with Carvel Dari-Freeze Stores, Inc. and Carvel Stores of New York, Inc. Pertient provisions are:

> "1. (Hood) agrees to manufacture as much Carvel mix as may be required by the various Carvel dealers * * * for the operation of their respective Carvel stores * * * and Carvel hereby agrees to purchase all its requirements of Carvel Mix in said area only from (Hood)."
>
> 5. (a) Dealers may order mix directly from Hood.
>
> 5. (f) (Hood) "agrees that he will deliver only Carvel Mix to Carvel stores, and no other ice cream mix or ice cream preparation of any kind."
>
> 7. (a) Hood is obliged to collect from each store on delivery.
>
> 7. (c) Hood may be required by Carvel to collect royalties due Carvel from the dealers.

Rakestraw Contracts (Pl. Ex. 15, R. 337, 3204, 5).

The agreement of May 14, 1956 with Carvel Stores of New York, Inc. is substantially identical with the Hood agreements of that date (Pl. Ex. 10).

Eagle Cone Contracts (Pl. Ex. 11, R. 264, 3186, 7)

The preamble refers to Carvel's "franchised dealers". Pertinent provisions are:

> 1. "The Supplier agrees to manufacture and sell to Carvel, and Carvel agrees to purchase from the Supplier * * * all of Carvel's requirements of the cones hereinafter described", for all the Carvel stores in the tri-state area of New York, Connecticut and Massachusetts.
>
> 4 (b) "The Supplier agrees to produce cones of the said design only for Carvel, and for no other person."
>
> 5. The quality of the cones shall be "no less good than the standard quality cones produced by the Supplier".
>
> 7 (a) Eagle will deliver on instructions from Carvel dealers.
>
> 8 (a) Eagle will print Carvel invoice forms.
>
> (b) Eagle will prepare and deliver the invoices to each store and bill the dealers at prices agreed upon by Carvel and Eagle.

It is submitted that the circumstances surrounding the various supplier contracts and the provisions thereof—the suppliers' obligation to separately invoice each store, to deliver to each store, to collect from each store (in the case of the dairies, to collect Carvel's royalties when requested to do so)—permit the inference that the supplier defendants must have known that the stores were independently owned and operated. They must have been aware, also, of the restrictive provisions of the franchise.

Carvel's letter to Dairymen's League (Pl. Ex. 19, R. 356, 3226) states:

> "We understand that the majority of dairies that sell mix are aware of the nature of the relationship of Carvel and its franchised dealers * * *."

Moreover, the Carvel-supplier agreements are "all requirements" contracts whereby Carvel undertakes to buy, and the supplier undertakes to sell, all of Carvel's requirements of the particular product. It is inconceivable that a supplier will enter into such an agreement without information as to what the requirements are and upon what they are based. The requirements were obviously not those of Carvel, but of the independently owned and operated stores franchised by Carvel. The suppliers must have been informed and must have known of the reasons, *i.e.*, the restrictive provisions of the franchise, why Carvel could undertake to contract for the purchase of all the requirements of hundreds of independently owned stores. The Eagle Cone contract, for example, was negotiated in five separate sessions over a substantial period of time (Martin Cain affidavit, par. 13 (Pl. Ex. 24, R. 135, 3245)). That contract was admittedly "unique in the industry" (Cain affidavit, par. 9) and none of Eagle Cone's competitors had that type of deal (Cain affidavit, par. 16). The conclusion is inescapable that, in view of the foregoing circumstances, the nature of the Carvel-dealer relationship must have been known to the supplier defendants. No other inference is possible, particularly in the light of Cain's statement (par. 9 of Exhibit 24) that

> "The contract was also advantageous to Eagle because *it assured a stable market* for it to sell. This factor was especially attractive to Eagle because of the fierce competitive nature of the cone industry where orders are given on an 'as needed' basis." (emphasis supplied)

It is clear that Cain's use of "stable market" (in reality, a captive market) could stem only from a complete aware-

ness of the restrictive provisions of the Carvel franchise. It is also suggested that the foregoing quotation is tantamount to an admission of an express intent to join with Carvel in suppressing competition.

It is further submitted that these Carvel-supplier contracts clearly constituted boycott agreements pursuant to which the suppliers each agreed to refrain from dealing with or selling to the dealers directly. The dairies agreed to deliver "only Carvel mix to Carvel Stores, and no other ice cream mix or ice cream preparation of any kind". Eagle Cone agreed to produce the cones only for Carvel "and for no other person". The clear intent necessarily inferable from the contracts themselves is to exclude competition and to preclude the dealers from purchasing directly from the suppliers the same or other products.

It may be contended that the Eagle Cone contract is removed from this category by reason of its apparent involvement with cones of a specified design. Such contention would not be persuasive. The contract provided for two types of cones, a "Major" and a "Buddy Twinkle". Cain's affidavit, par. 10, stated:

> "Actually, the 'Buddy Twinkle' went out of use shortly after the contract was signed and was substituted by our 'No. 40 cake cup cone' * * *."

Examination of the price list attached to Cain's affidavit and of Exhibit 45 reveals that the "No. 40 cake cup cone" was and is a standard Eagle Cone product produced for and sold to the trade, and is in no respect designed or adapted peculiarly for Carvel products. In addition, the design of the "Major" cone is shown to be identical with the reproduction of Eagle's "Flare Top Cones" appearing on Exhibit 45, which is also a standard Eagle product. Comparison reveals that while the Carvel cone has the word "Major" in place of the words "Flare Top", the size, shape and design of the two are identical. Each has the same swirl design; each has the word "cake" impressed

below the swirl; each has an identical design alongside the word "cake". The only difference is in the word "Major", but this is not a word or name that is part of a Carvel trademark or is otherwise identified only with Carvel or Carvel products. In fact, the swirl effect on the Eagle cones made for the general trade must inevitably cast doubt upon Carvel's claims of uniqueness by reason of its use of the swirl design.

Cain said further in his affidavit, par. 10:

> "Later, other type cones were sold by Eagle to Carvel, after negotiations were held between the parties."

Such other cones are not otherwise identified and no claim is made by either Carvel or Eagle that they were of a special design only for Carvel. The fact is that these were ordinary products produced in the regular course of business by Eagle and capable of being produced without difficulty by any other supplier. This was impliedly conceded by Cain in his affidavit, par. 9, when detailing the advantages accruing to Eagle by reason of the contract, he said:

> "Eagle could resort to its affiliated cone manufacturers in the East who could make the special Carvel cone to supply Carvel in the event of a labor dispute or an Act of God."

Caine's statement, par. 16, that Eagle has 15 major competitors in the area demonstrates clearly that the contracts excluded rivals from the market consisting of Carvel stores.

The testimony of Vettel further disclosed that the dealer can purchase only cones of a size designated by Carvel, and that if he purchased other sizes he would not be allowed to keep them, "and if he went to Eagle Corporation they wouldn't sell them to him" (R. 31).

It is therefore clear that Carvel enjoys a one hundred per cent monopoly of the independently owned and operated stores not only by virtue of the franchise agreements, but as a result of the concert of action of the suppliers. The situation is similar to that presented in *Associated Press* v. *U. S.*, 326 U. S. 1, 65 S. Ct. 1416, where the by-laws of the AP prohibited their members from selling or furnishing their spontaneous news to any agency or publications except AP. Just as in that case, the supplier contracts here involved restrict commerce because they limit the freedom of Hood and Rakestraw to sell Carvel mix *or any other mix* to the dealers; they limit Eagle in the sale of cones to the dealers; and they restrict the dealers' ability to bargain with other suppliers.

As the court pointed out in *William Goldman Theatres* v. *Loew's, Inc.*, 150 F. 2d 738, 743 (3d Cir.), no evidence was offered by any corporate officer of any of the defendants that there had been no agreement to exclude. The court said:

> "It was enough that, knowing that concerted action was contemplated and invited, the distributors gave their adherence to the scheme and participated in it."

All the circumstances present here compel the conclusion that between Carvel and the suppliers there was either agreement or at least acquiescence in a program of concerted action.

Thus, it is clear that the Carvel supplier entente constitutes a combination and conspiracy to boycott by withholding from the dealers all products except those specified by Carvel, and by restricting trade between the dealers and suppliers even in the specified products, and is thereby a *per se* violation of the Sherman Act.

While a supplier may ordinarily exercise his own independent judgment as to those with whom he will deal, that

right is subject to the condition that a particular method of doing business must not be violative of the Sherman Act. *William Goldman Theatres* v. *Loew's, Inc., supra.* Accordingly, it has been held in *Standard Oil Company of California* v. *Moore,* 251 F. 2d 188, 211 (9 Cir.), cert. den. 356 U. S. 975, 78 S. Ct. 1139, that

> "an agreement, combination or conspiracy between two or more persons engaged in interstate commerce, to withdraw or withhold custom from another, or with a class of others, is violative of the antitrust laws."

See also *Kiefer-Stewart Co.* v. *Joseph E. Seagram & Sons, Inc.,* 340 U. S. 211, 71 S. Ct. 259; *Associated Press* v. *U. S.,* 326 U. S. 1, 65 S. Ct. 1416; *U. S.* v. *Frankfort Distilleries, Inc.,* 324 U. S. 203, 65 S. Ct. 661.

The Eagle Cone contracts require that defendant to sell only to Carvel and no other, while the Hood and Rakestraw contracts require those defendants to deliver no other mix or ice cream preparation, other than Carvel mix, to the dealers. Thus, the clear purport of these agreements requires the suppliers to refrain from dealing with the operators. The restraint upon plaintiffs to purchase only from Carvel and to use only Carvel mix, coupled with the suppliers' agreements to sell only to Carvel and to deliver no other mix or ice cream preparation to the stores, effectively operate to prevent and preclude the suppliers from dealing directly with the plaintiffs.

In *Klors, Inc.* v. *Broadway-Hale Stores, Inc.,* 359 U. S. 207, 79 S. Ct. 705, it was held that concerted refusals by traders to deal with others constitute *per se* violations of the Sherman Act. Thus, the combination of Carvel and the suppliers takes from the plaintiffs their freedom to buy in an open competitive market. It deprives other suppliers of their freedom to sell the plaintiffs. It thus interferes with the free flow of commerce and has, by its nature and character, a monopolistic tendency.

It is clear from this Court's holding in *United States* v. *Parke, Davis and Company*, 362 U. S. 29, 80 S. Ct. 503, that a manufacturer who acts in concert with another or others to accomplish what he could lawfully accomplish when acting alone, may violate Section 1 of the Sherman Act. And, we submit, under the circumstances inherent in this case, the Carvel-supplier contracts, without more, are *per se* illegal. Such contracts as are here involved, whether considered as reflecting a horizontal understanding among distributors or a vertical one between manufacturer and distributor, are so anticompetitive in both purpose and effect as to be unreasonable restraints of trade.

VI

The evidence supports a finding of unlawful price maintenance policies.

It is firmly established that any fixing of prices by two or more persons violates Section 1 of the Sherman Act (except, of course, for "fair trade" agreements), *U. S.* v. *Socony Vacuum Oil Co.*, 310 U. S. 150, 60 S. Ct. 811; *U. S.* v. *Bausch & Lomb Optical Co.*, 321 U. S. 707, 64 S. Ct. 805, and price fixing, absent authorizing statutes, is illegal *per se*. *U. S.* v. *Line Material Co.*, 333 U. S. 287, 68 S. Ct. 550.

It is undisputed that the early franchise (Pl. Ex. 2, R. 221, 3150) violates this proscription. Carvel has not appealed from that ruling of the trial court.

The issue remains whether the revised franchise (Pl. Ex. 1, R. 208, 3147) and SOP (Ex. 8A) effected any material change in Carvel's policy respecting resale prices. The later franchise ostensibly gave the dealer the right to determine prices and Carvel allegedly notified all dealers thereof by letter dated February 27, 1956 (Ex. C-1b, R. 283, 3514). It is contended, however, that despite the

apparently unequivocal language used, Carvel nevertheless continued to employ and carry out a policy of price maintenance at the retail level.

On May 24, 1956, Carvel wrote to Giberman complaining of his selling a cone at 15¢ when the SOP prescribed only 10¢ and 20¢ cones (Pl. Ex. 40, R. 379, 3281). Carvel asked him for the indentity of other stores selling a 15¢ cone so that it could "take whatever steps are necessary to have these stores conform to the operation as prescribed in the S.O.P." Carvel also told Giberman that he must "maintain the 10¢ and 20¢ selling prices as recommended in the S.O.P." and must "not go below the minimum portions prescribed in the S.O.P." This clearly indicates a policy and course of action to fix and maintain prices at the retail level.

It is noteworthy that Vettel denied that the dealer had to maintain the 10¢ and 20¢ price on cones after Carvel's alleged change of policy (R. 34).

The evidence is clear that Carvel continued to employ the post-1955 SOP to regulate and maintain prices. In Section J of that book, pages 16, 24, 41, 42, 44 and 48, all dated during 1957, still make reference to "Standard selling price." Despite this, Vettel swore that Carvel had not used the term "Standard prices" for at least four to six years (R. 170, 1).

On May 21, 1956, Carvel wrote to Giberman (Pl. Ex. 42, R. 275, 3283) commenting on his special sales and requesting to be advised of them in the future "so that we may approve them." The letter also contained the significant clause "*should* such sales be approved by us * * *." (emphasis supplied). In another letter to Giberman dated July 17, 1958 (Pl. Ex. 41, R. 381, 3281), Carvel threatened him with termination of his franchise for selling "at wholesale prices."

The franchise and SOP (Section D) require the dealer to use only Carvel approved advertising material and signs. Section B, page 18, item 5 of the SOP calls for the posting of signs as prescribed in Section D. The approved signs, posters and advertising mats furnished by Carvel to the dealers all had specified retail prices printed thereon (Pl. Ex. 39, 3280). To insure that such advertising material was used, Carvel instructed dealers that no credit for co-operative advertising would be given unless such advertisements were approved by Carvel *prior* to their publication (Pl. Exs. 28, R. 361, 3259; 36, R. 376, 3277; and 37, R. 377, 3277). In its effort to maintain prices by circumvention, Carvel prohibited the dealers from using the Carvel name in connection with signs of increased prices (Pl. Exs. 27, R. 274, 3259, and 46, R. 385, 3354). When Carvel would decide upon a price change, the dealers were so advised and received new signs and price stickers to paste over the old price (Pl. Exs. 26, R. 360, 3258; 29, R. 362, 3264; 31, R. 363, 3267; 38 R. 378, 3277). Plaintiff's Exhibit 89 (R. 418, 3641) is the Carvel Daily Feature Calendar for an entire month showing the prices of the features pre-determined by Carvel.

The requirement to secure advance permission from Carvel in order to run a special sale at prices below the standard permitted is identical in both the pre-and post-1955 SOP (Section K, p. 2). It is undisputed that Carvel regarded this as a mandatory provision. In (Pl. Ex. 25, R. 359, 3254), a Bulletin to all stores, Carvel stated:

> "As you know, under our Franchise Agreement, the stores are not permitted to conduct special sales without first having received permission from the parent organization."

Even when such approval is given, Carvel insists upon notifying other stores in the area of the dealer planning the sale so that they might have an opportunity to participate therein (Pl. Ex. 42, R. 275, 3283). Carvel thus employs the special sale to maintain a level of prices.

It is also clear that one facet of a resale price maintenance policy is control over the portions to be served (Pl. Exs. 29, R. 362, 3264; 40. R. 379, 3281 and 60, R. 399, 3363).

The Carvel system includes a board of governors consisting of various dealers appointed by Carvel. This group of dealers makes "recommendations for the change in the recommended level of price changes" (R. 35). At their meetings they discuss changes in the retail sales price of Carvel products (R. 36, 7). Carvel's recognition and acceptance of this function of the board of governors is apparent from the penultimate paragraph of Exhibit 40. The dealers themselves recognize Carvel's control over prices as witness the effort of some of them, at a dealer's convention in February, 1958, to recommend that "the selling price of items be increased" (p. 3 of Pl. Ex. 35, R. 368, 3275). While the result of this action is not indicated, the discouraging treatment it received permits an inference that the recommendation was disapproved.

The admission by Carvel that the board of governors makes recommendations of price levels at which Carvel products should be sold by the dealers (R. 35) is in effect an admission of unlawful price fixing. Before a recommendation could be made, the board must have reached an agreement as to what the level of prices should be. The fact that Carvel published prices as "suggested" prices does not immunize them, for they still remain prices agreed upon in concert by the board of governors representing the dealers by appointment of Carvel.

The Attorney General of the United States, in an opinion before the House Select Committee on Small Business on May 3, 1963, stated as reported in CCH #50190:

> "It proposed to advertise items at prices determined by an executive committee of the local druggists. The fact that prices would be stated in the ads is not controlling. It was in fact that the prices were determined and agreed upon which made the proposed plan illegal."

It is therefore apparent that Carvel utilized the dealers themselves to police and maintain the price structure. The dealers thus became agents in the price maintenance scheme and their concerted recommendation and approval of price changes was equally violative of law. The fact that some dealers may not have adhered strictly to Carvel's price structure does not cloak Carvel with immunity so long as it can be reasonably inferred that a price fixing system existed with the purpose of maintaining retail prices. *U. S.* v. *General Electric Co.*, 82 F. Supp. 753, 881 (D. C. N. J.).

It is fundamental that the illegality of a price maintenance arrangement may be shown by a system of policy, combinations or co-operative efforts. This Court held in *Federal Trade Commission* v. *Beech-Nut Packing Co.*, 257 U. S. 441, 42 S. Ct. 150, which also involved "suggested" prices, that proof of illegal price maintenance needs no specific contract but may be shown by the defendant's methods in securing the cooperation of its dealers which are as effectual as agreements. And in *United States* v. *Parke Davis and Company*, 362 U. S. 29, 44, 80 S. Ct. 503, 512, the court amplified the *Beech-Nut* doctrine and held that judicial inquiry will not stop with a search of the record for evidence of purely contractual arrangements.

In seeking to disclaim any price maintenance policy, Carvel introduced Exhibit C-3, (R. 285, 3522) a letter to Giberman. Despite the apparent disclaimer, this letter still insisted that items be made and portions measured in accordance with the SOP. This letter, moreover, is directly contradicted by Carvel's letter to Giberman more than a year later (Pl. Ex. 41, R. 381, 3281), prohibiting him from making sales at wholesale prices and emphasizing that his franchise permitted only the sale

> "of the end product that is offered for consumption to the retail purchaser *as scheduled in the Standard Operating Procedure Manual at prices indicated therein.*" (emphasis supplied)

The trial court stressed Exhibit 46, (R. 385, 3344), dated September 3, 1957 (R. 67) but ignored the restriction in that letter against use of Carvel signs to indicate price changes.

Vettel testified that since some time in 1957, Carvel supplied signs without printed prices (R. 33, Exs. C-16 (3517) and C-17).[16] In particular, C-17 is a sign for the daily feature with no printed price. This testimony is contradicted by Carvel's letter to Pierce of September 8, 1958 stating that "we do not have signs for Daily Features without recommended prices" (Pl. Ex. 43, R. 276, 3284). The letter also states that price change stickers are available through the order department, but such stickers, as has been shown, were not blank but contained printed prices. The inference is clear that any price change stickers were available only if Carvel approved a sale "at a price below the standard permitted". Corroboration is found in Exhibit 89, (R. 418, 3641), the daily feature calendar for July, 1959, which reflects prices established by Carvel.

In its letter to Seu of March 20, 1959, part of Exhibit C-3, Carvel was referring to prices to be charged in a proposed wholesale business which, as Vettel pointed out, "would require an entirely new and different licensing arrangement for your store". C-3 addititionally contains copies of letters allegedly sent by Carvel to members of the public stating in substance that the dealer determines prices. It is submitted that copies of letters purportedly sent to strangers to these actions should be accorded no probative weight. These addressees were apparently customers at different Carvel stores which are independently owned. They were not, obviously, customers of Carvel nor had they any dealings with Carvel. Such letters are self-serving in nature.

[16] These exhibits were brought to Court pursuant to Rule 38.

Carvel additionally enforces its price maintenance policy through a system of supervision which reports amongst other things, on the use of unauthorized signs and the proper weight of the end products (Pl. Exs. 42, R. 275, 3283; 44, R. 277, 3286; 50, R. 389, 3356; 53, R. 392, 3358; 76, R. 413, 3384).

It is difficult to reconcile Carvel's claimed abandonment in 1955 of price fixing with its Bulletin of February 13, 1958 (Pl. Ex. 35; R. 368, 3275) relating to the convention just concluded at which Vettel "discussed the recommendation of some store owners that the selling prices of items be increased". It is obvious that if, in fact, Carvel had long since discarded price restraints, there would have been no occasion at that late date for such recommendations by *any* of the dealers.

It is submitted that the proof amply demonstrates that Carvel continued to pursue and enforce a policy of resale price maintenance implemented by an apparatus consisting of the following:

1. SOP requirements of "recommended" and "standard" prices

2. Required maintenance of 10 and 20 cent prices of cones;

3. Specifying the minimum size of portions in all end products;

4. Prohibition of sales at less than "standard" prices without prior approval;

5. Control over point-of-sale signs and other advertising material which dealers must use;

6. Threatening breach of franchise to dealers who used Carvel signs to advertise increase or decrease in Carvel's prices;

7. Soliciting the cooperation and agreement of dealers to report price deviations in order to secure adherence to recommended and standard prices;

8. Promotion of agreements or understandings between dealers, through the medium of the board of governors, to adhere to sale prices; and

9. A system of supervision which reports on use of unauthorized signs and the proper weight of the end products.

These factors clearly create a presumption of resale price maintenance which cannot be rebutted by self-serving letters but only by evidence of actual sales at other than the suggested prices. Carvel, with 400 dealers to call on, offered no such evidence.

The significance of the various signs, advertising material and price circulars emanating from Carvel was pinpointed by Judge Yankwich in *U. S.* v. *Food And Grocery Bureau of So. Cal.*, 43 F. Supp. 966, 972-3 (D. C. Cal.), when he said:

> "The butter and egg cards and other circulars of similar character, quoting prices on sugar and other commodities such as milk, cereals, baking powder, oleomargerine, from day to day, are distinctly price-fixing documents—as one of counsel for the defendants frankly admitted."

It is therefore clear that the contentions of Carvel that its policy is merely one of "suggesting" prices is sham. The conclusion is inescapable that the dealers are told what prices to charge and they are spied upon, graded, reported and subjected to various pressures to secure their adherence to such prices.

The cooperative advertising, using material furnished by Carvel which included reference to prices, affords an obvious opportunity for inference that the parties to the

cooperative advertising progroam have engaged in a price-fixing agreement. Such inference is buttressed by the Carvel requirement of advance approval of any such advertisements. This is a subtle form of coercion which, together with other forms of coercion as evidenced by the record, compelled adherence to a maintenance of price policy. Such coercion will not be condoned. *Simpson* v. *Union Oil Company of California*, 84 S. Ct. 1051, — U. S. —.

This Court will pierce the veil of any artificial device, however subtly contrived, to cloak a forbidden practice with the mantle of legality. The Carvel self-serving letters should be accorded no probative weight but should be treated as nothing more than clever draftsmanship. As this Court stated in the *Simpson* case (84 S. Ct. at 1058),

> "We refuse to let a matter so vital to a competitive system rest on such easy manipulation."

The only apparent contradiction to the plain import of plaintiffs' evidence, all of which emanated from Carvel itself, comes only from Carvel self-serving documents. This is no contradiction sufficient to create an issue for the trier of the facts. It is a self-denial designed to camouflage the practice and policy as clearly revealed by the exhibits which *followed* the pious declaration of February 27, 1956 (Ex. C-1B).

VII

Conclusion.

There can be no question but that the Carvel system has the capacity, tendency and effect to suppress competition in a particular line of commerce. Of particular significance in considering Carvel's intent and purpose to eliminate and foreclose competition is the franchise provision restricting the dealer from engaging in a similar business in the event of termination of his franchise. It is noteworthy that although the franchise granted the dealer a relatively small exclusive territory, the restriction against his engaging in a similar business after termination covered a radius of 25 miles. Since, once his franchise terminated, he could no longer use the Carvel name, he could not conceivably damage Carvel's trademark. Under such circumstances, the prohibition against engaging in a similar business in so large an area was an unreasonable restraint of trade and was obviously designed as such. The subject was treated in *Dictograph Products, Inc.* v. *Federal Trade Commission*, 217 F. 2d 821, where the court said at page 823:

> "There are various terms of the agreements which serve to implement the exclusive dealing features, the most important of which is the following restrictive covenant which applies in case the agreement be cancelled by either party as would doubtless be the result of any persistent attempt by the distributor to sell the hearing aids of competitors:
>
> 21. In the event of the termination of this agreement by either party distributor expressly covenants and agrees that for a period of *one* year from the date of said termination the distributor will not directly or indirectly carry on or be engaged, employed or interested in any hearing aid business within the territory outlined in Paragraph 2 hereof * * *."

It is submitted that the record clearly establishes that Carvel embarked upon a course involving the attainment

of a scheme of uniform prices and the suppression of competition in a particular line of commerce, aided and abetted by the supplier defendants.

The key to this case is the economic power Carvel possesses over its dealers. Ostensibly, they are independent business men, but behind the legalistic facade of independence, there exists a servitude caused by the coercive pressures which Carvel exerts upon them. The chief factor of their relationship is the franchise with its compulsion to buy, use and sell products obtained only from Carvel and at prices determined by Carvel. It is quite clear that the dealer is no more than an economic serf rather than an independent entrepreneur free to buy and sell the goods of his choice. Constantly suspended over his head is the threat of termination with the consequences disproportionately grave to the dealer.

This case discloses what is probably the most remarkable, comprehensive and far-reaching bundle of restraints ever compressed into a single situation. They far outstrip the legitimate demands of trademark protection or quality control. These otherwise lawful purposes disappear in the overlapping webs of anticompetitive restraints spun by Carvel. The courts have often applied the term "pernicious" to proscribed tie-ins. We submit that the term is woefully inadequate to describe the tie-ins here involved.

There is no redeeming feature to the Carvel situation. The tentacles of the Carvel octopus, wherever they have reached, have strangled free enterprise with a frightening finality. Every facet, every feature, every factor of the Carvel franchise is designed solely to restrain and foreclose freedom of competition. The variety and miscellany of restraints have no other purpose. They have, in addition, no parallel in any recorded case.

The courts have frequently been met with the plea that protection of goodwill justifies a departure from strict enforcement of the antitrust laws. And just as often the courts have refused to permit such a plea, even when honestly advanced, to provide an immunity from the proscriptions of the Sherman and Clayton Acts.

We submit that the following factors clearly establish the Carvel purpose and intent to restrain commerce rather than to protect the trademark.

1. The aforesaid restrictive covenant at the termination of the franchise;

2. The requirement that Carvel signs and trademarks only may be used in or about the premises, thus making it impossible for dealers to purchase and sell non-Carvel products by indicating to the public by appropriate signs that the products so offered for sale are not Carvel products;

3. The requirement that dealers purchase all ingredients and supplies exclusively from Carvel or a single designated source and at prices fixed by Carvel either unilaterally or by agreement with such designated source;

4. The fact that Carvel receives a profit on all merchandise so purchased by dealers;

5. The restriction against the sale of any product not approved by Carvel;

6. The prohibition against engaging in any similar business elsewhere during the term of the franchise;

7. The failure and refusal of Carvel to supply specifications and standards for ingredients, paper goods and other supplies;

8. The policing system which placed primary importance on the dealers' use of unauthorized equipment and unapproved goods other than frozen dairy products,

with minor and secondary attention to the quality of the ice cream product;

9. The requirement, in the later franchise, that equipment comply with the specifications of the SOP which specified, *inter alia,* the Carvel patented items not obtainable elsewhere, thus nullifying the option in the franchise to obtain equipment from others than Carvel;

10. The obligation in the early franchise to acquire all equipment from Carvel;

11. The prohibition against the use of paper cups bearing a name other than Carvel;

12. Threatening competing suppliers with suit for trademark infringement or for inducing breach of contract if they sold to Carvel dealers, thus clearly indicating a plan to suppress competition since the trademark could be protected by Carvel furnishing such suppliers with its specifications to meet as a requirement for selling its dealers;

13. The prohibition in the early franchise against the sale of any frozen dairy product unless made from Carvel mix in a Carvel freezer whether or not such product was sold as a Carvel product;

14. The right to Carvel, in the early franchise, to recapture the freezers, in the event of the dealer's breach of the franchise, at a price ranging from 50% to 90% less than the dealer's cost, thus making it difficult and impractical for the dealer to engage in a similar business elsewhere;

15. The right of Carvel, in the event of the dealer's breach of the franchise, to evict the dealer and obtain title to the building, which had been erected at the dealer's expense, at approximately 50% under cost, with the price to be paid monthly for the unexpired term of the franchise, with no payment to be made for any month that a business was not operated on the premises;

16. The lease of the store premises, conditioned upon compliance with the terms of the franchise;

17. The conditional reassignment of the lease as security for faithful performance of the franchise;

18. The obligation to obtain advance approval for special sales so that neighboring dealers could be advised thereof and participate therein;

19. The obligation to maintain a 10 and 20 cent sales price on cones;

20. The imposition of "recommended" and "standard" prices;

21. The required use of Carvel signs and advertising material with prices printed thereon;

22. The promotion of agreements between dealers, through the board of governors, to maintain a level of prices;

23. The disapproval of quality products such as Coca Cola;

24. The agreements with the suppliers for all of Carvel's requirements which were, in fact, the requirements of the dealers;

25. The prohibition on the dairies against delivering anything but Carvel mix to the dealers;

26. The franchise requirement that if the dealer's business expanded, he would be obliged to purchase additional Carvel patented equipment from Carvel.

There is no question but that these varied restraints serve no purpose beyond the suppression of competition. No one of them is actually necessary for proper trademark protection. A trademark owner's natural interest in efficient performance and his goodwill is sufficiently protected by specification of the type and quality of the

product to be used under the trademark and conditioning the license therefor upon the use of materials which conform to such specifications. But this legitimate practice is foreign to the Carvel operation.

Merchandise of comparable quality is concededly available from sources other than Carvel or its designated suppliers. It was not established that equivalent equipment was unavailable. Carvel failed to prove that the restraints inherent in its franchise agreements and merchandising methods are no greater than reasonably necessary to protect its trademark and to protect the public against deception. The contrary is in fact true, and results in the emergence of a clearly perceptible pattern of illegality.

The acts and practices complained of were followed with respect to all of Carvel's dealers. All the 400 dealers were similarly affected. Thus, while one or more of the acts charged may not be separately violative of the antitrust laws, their inclusion as an integral part of an over-all scheme to restrain competition tars them with the brush of illegality. The demonstrated effect has been to force abdication of the dealer's independent judgment as to the merits of the tied products and to insulate them from the competitive stresses of a free and open market, and to preclude all other suppliers from such market. It may be logically argued that if the tied products were of superior quality, they could withstand unrestrained competition without the artificial protection of coercive conditions.

We submit that the record sufficiently establishes Carvel's very thorough violation of the antitrust laws. The quantum of power over the tying product prerequisite to Sherman Act violation is simply sufficient economic power to impose an appreciable restraint on free competition in the tied product. And we suggest that the requisite control of the tying product may, without more, be inferred from

the seller's success in imposing a tying condition upon a substantial amount of commerce in the tied product.

We further submit that in still another area, the agreements here involved are illegal *per se* as exclusive dealing agreements. We urge that in the context of this case, the exclusive dealing agreements, which can serve no other purpose but to restrain competition, are part and parcel of the over-all pattern of illegality. Indeed, absent such agreements, the unlawful framework of the Carvel system must collapse. We submit that these agreements, by their nature, purpose and use, call for the logical extrapolation of this Court's unambiguous words in the *Standard Stations* case which bordered on the threshold of *per se* illegality.

In effect, what the District Court and Court of Appeals have done is to immunize a trademark owner against the proscriptions of the Sherman and Clayton Acts. The trademark owner is thereby given greater liberties under the law than the owner of a patent or copyright. The decisions of the lower courts have, in effect, emasculated and repealed the antitrust laws with respect to the owner of a trademark.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 355

BERNARD SUSSER, et al.,
Petitioners,

vs.

CARVEL CORPORATION, et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT, H. P. HOOD & SONS, INC.

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT, H. P. HOOD & SONS, INC.

Statement

The respondent, H. P. Hood & Sons, Inc. ("Hood") is a supplier-defendant in six out of nine actions in which petitioners claim treble damages for alleged violations of the antitrust laws. The nine actions were tried by the District Court, without a jury, and the six complaints against Hood were dismissed (R. 43-71). Thereafter, the Court of Appeals unanimously affirmed the judgment dismissing the complaints against Hood (R. 431-458).

Hood is a Massachusetts corporation engaged in the manufacture and sale of quality dairy products. Peti-

tioners, plaintiffs in each of the six actions, are now or were the operators under franchise agreements of Carvel retail ice cream stores. In each of the stores, petitioners sold to the public Carvel Frozen Dairy Products, manufactured by petitioners, using as a basic component Carvel Special Formula Ice-Cream Mix processed by Hood for Carvel.

The actions were brought primarily against the Carvel Corporation and its corporate subsidiaries. But petitioners also joined, as defendants, certain independent companies, of whom Hood is one, which furnished supplies to the Carvel companies and delivered those supplies, on Carvel's instructions, directly to the Carvel retail stores. These peripheral defendants are sometimes referred to collectively as the "supplier defendants".

In addition to petitioners' claims based upon the antitrust laws, the complaints contained, originally, claims against the Carvel defendants *only*, alleging that petitioners had been induced by fraud on the part of Carvel to enter into the franchise agreements with Carvel. Those fraud claims were severed from the antitrust claims and were tried before the District Court, without a jury, in 1961. But Hood was never charged with any fraud and took no part in that trial. The District Court directed that the fraud claims against Carvel be dismissed.

Hood manufactures for and sells to the Carvel companies, under supply contracts between it and Carvel, a special type and kind of ice cream mix which is prepared according to a secret and confidential formula

or recipe originated by Carvel and furnished by Carvel to Hood. This mix is a perishable food product and is, therefore, delivered by Hood, on the instructions of Carvel, directly to certain Carvel retail ice cream stores in Massachusetts and Connecticut.

Such delivery by Hood is obviously necessary to avoid delays which would be incident to any direct delivery to Carvel and to the warehousing of this perishable product, and which would impair its quality with danger to the public health. Delivery direct to the retail stores also substantially decreases the expense of distribution and increases the speed and efficiency with which the Carvel frozen dairy products are made available to the consuming public.

The Sole Issue Relating to Hood

Petitioners initially alleged the existence of a widespread conspiracy between Carvel and the supplier defendants, including Hood, to subject the Carvel store operators to all of the allegedly onerous and illegal conditions of the Carvel franchise and related agreements. But petitioners subsequently limited, drastically, these far-flung charges with the consent of all other parties.

Thus Pretrial Order No. 5, entered on consent, provides in part (R. 148):

> "4. That plaintiffs agree that they are relying solely upon alleged *per se* violations of the antitrust laws and make no claim other than that their evidence will establish *per se* violations of the antitrust laws."

With respect to the evidence to be offered by petitioners at the trial, the Pretrial Order continues:

> "5. Plaintiffs' evidence at the trial on the issue of liability will be limited to (a) written agreements entered into between the Carvel defendants and the plaintiffs, and other documents supplementary thereto or explanatory thereof, (b) *written agreements between the Carvel defendants and the supplier defendants,* and other documents supplementary thereto and explanatory thereof, and (c) testimony heretofore taken of a Mr. Vettel and a Mr. Bittner."* (Emphasis added) (R. 148, 450).

But none of the agreements between Carvel and the petitioners contains any mention of Hood. The only agreements which mention Hood are five Carvel-Hood supply contracts of which "Plaintiffs' Exhibit 10 is representative" (R. 252-262; 3186). The sole issue pertaining to Hood, therefore, is whether these supply contracts evidence practices or agreements which constitute *per se* violations of the antitrust laws.

To sustain *per se* violations of the antitrust laws against Hood, petitioners must establish that these supply contracts evidence one of those:

> "* * * agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed

* This testimony was given in an action for an injunction brought by Carvel against James Pierce, et al. in Pennsylvania. Hood was not a party to that action and has had no dealings with James Pierce.

All parties concede that the witness described as "Mr. Bittner" in the pretrial order was, in fact, a Mr. Ray Althouse, a truckdriver for Rakestraw, a defendant in actions to which Hood is not a party.

to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use." *Northern Pac. R. Co.* v. *United States,* 356 U. S. 1, 5.

The Carvel-Hood supply contracts evidence no such agreements or practices.

Hood Not Charged as a Participant in a Common Conspiracy

Nothing contained in any of the agreements or documents or in any of the testimony proffered by petitioners establishes, or even suggests, that Hood participated in any way in the negotations for, or in the preparation and execution of, any agreement of any kind, relating to Carvel or the petitioners, other than the Carvel-Hood supply contracts. Nor is there any evidence that Hood had any knowledge of any franchise or other agreement between Carvel and any of the Carvel store operators or of any agreement between Carvel and any other supplier, prior to the commencement of these actions.

Indeed, petitioners expressly declared that they do not charge that Hood and the supplier respondents engaged in any general or common conspiracy with Carvel and with each other in furtherance of violations of antitrust law. The alleged liability of Hood and the other supplier respondents is predicated upon the theory of separate unlawful conspiracies on the part of Hood and *each* of the supplier respondents *with Carvel* not to sell direct to the petitioners.

Thus counsel for petitioners conceded at a pretrial hearing that there was no "combination between the supplier defendants", no "sort of round-robin with all of them participating"; and asserted that petitioners only charged that "Carvel was violating the antitrust laws by a series of agreements going out to each of the supplier defendants individually" (R. 149).

Conformably the District Court stated in its opinion (R. 51):

> "The liability of the supplier defendants is predicated upon alleged unlawful conspiracies on the part of each of the supplier defendants with Carvel not to sell direct to the plaintiffs. The plaintiffs do not contend that the supplier defendants engaged in any common conspiracy with Carvel and with each other in furtherance of any illegal end. No evidence of any such conspiracy was offered; the plaintiffs relied on the agreements between Carvel and the supplier defendants to establish the unlawful conspiracies."

In the light of the foregoing sharp limitation of the issues no weight whatsoever should now be accorded to petitioners' subtle intimations: that there was a broad "concert of action of the suppliers"; a "program of concerted action" between Carvel and the suppliers; and a "Carvel supplier entente" constituting a "combination and conspiracy" (Pets. Br. p. 51).

Nor should the Court be misled by petitioners' confusing references to the statements in an affidavit of Martin Cain, Sales Manager of Eagle Cone Corporation, one of the supplier defendants, which petitioners apparently would impute, inferentially, in some meas-

ure, to Hood (Pets. Br. 48-53). For Martin Cain had no dealings with Hood and its representatives. And whatever transactions Cain and Eagle Cone may have had with Carvel and whatever Cain says about them they have no pertinence to Hood and do not bind Hood.

Similarly, none of the testimony of Vettel, general manager of the Carvel companies, has any bearing upon Hood's situation (Pets. Br. 50; R. 32). Hood's case rests upon its own separate and distinctive factual basis.

Summary of Argument

I

Hood's evidence establishes conclusively that it was not a participant in a common conspiracy or concert of action to violate the antitrust laws, involving Carvel and the supplier defendants—if such ever existed. Hood's situation as a respondent presents separate and clearly defined questions, and its position is irrefutably supported by stipulated facts and by the uncontradicted testimony of its witness, Walter Simonsen (R. 177-196).

Established are the facts that Hood had: no knowledge of Carvel's franchise agreements or other contracts with its store operators; no knowledge of the Carvel Standard Operating Procedure Manual; had nothing to do with the method or manner of operating the stores; did not determine or participate in determining the price or conditions of sale pursuant to which Carvel sold its Ice-Cream Mix to the store operators; and did not determine or participate in determining

the prices for which Carvel Frozen Dairy Products, made with Carvel Ice-Cream Mix as a component, were sold to the public.

II

The Carvel Ice-Cream Mix manufactured by Hood and sold *only* to Carvel was made in accordance with Carvel's special secret formula furnished to Hood by Carvel, which Hood agreed not to disclose to any unauthorized person. And Carvel supplied Hood with the stabilizer and emulsifier which Hood uses in preparing the mix.

Carvel had a perfect legal right to contract with Hood for the manufacture exclusively for Carvel of its Carvel Ice-Cream Mix in accordance with the recipe and specifications which Carvel furnished. And petitioners had no right, as the District Court held, to purchase this Carvel Mix from Hood "made pursuant to Carvel's secret formula, other than on the terms which Carvel prescribed." Similarly, the Court of Appeals soundly held: "Carvel enjoyed the right to sell it [the mix] to whomever it chose, . . . Carvel was free to insist that Hood . . . produce the mix solely for Carvel and subject to Carvel's wishes as to its disposition." (R. 449)

But close examination of petitioners' brief does not disclose a single mention or recognition: that Hood made Carvel ice cream mix under Carvel's special secret formula; that Carvel furnished Hood with the stabilizer and emulsifier; and that Carvel systematically inspected Hood's manufacture to insure high quality and sanitary handling (*Infra* 15-16). Certainly, this glaring fail-

ure is an implied admission of the extreme vulnerability of petitioners' case against Hood.

III

There is no merit to petitioners' claim based on the agreement by Hood not to sell non-Carvel mix or non-Carvel products to the store operators. For as both the Court of Appeals and the District Court expressly held: Carvel cannot be considered in competition with Hood or any of the suppliers, and such agreement not to deal—even if established—would not constitute an illegal boycott. *Packard Motor Car Co.* v. *Webster Motor Car Co.*, 243 F.2d 418 (D. C. Cir.), *cert. denied*, 355 U. S. 822 (1957); *Schwing Motor Car Co.* v. *Hudson Sales Corp.*, 138 F.Supp. 899 (D. Md.), *aff'd per curiam*, 239 F.2d 176 (4th Cir. 1956) *cert. denied*, 355 U. S. 823 (1957) (R. 53).

Moreover, both the Court of Appeals and the District Court further found: that petitioners had failed to prove that they had asked Hood or any supplier defendant to make sales of ice-cream mix or of ice-cream products or of any merchandise not approved by Carvel, and that Hood or any supplier had refused to do so; and also that petitioners had made no showing that they could not obtain non-Carvel ice-cream mix, ice-cream products or other merchandise from other suppliers; or that the refusal of Hood or of any other supplier to sell petitioners deprived them of access to such merchandise, that is, foreclosed alternate sources of supply (R. 53-54; 449).

Further, Carvel's supply contracts with Hood were soundly in the public interest. And for Hood to breach

its agreement with Carvel, as petitioners seem to contend it should, might well make Hood an accomplice in a fraudulent imposition upon the public. Any misrepresentation of food products, particularly highly perishable products, such as frozen dairy products, is a matter of vital public concern.

If Hood were to deliver an ice-cream mix other than the Carvel Mix, to Carvel stores and if the ice-cream products made therefrom were to be sold under the Carvel name, such conduct, as will be shown, could subject both Hood and the store operators to liability under Massachusetts and Connecticut statutes.

IV

The Carvel-Hood supply contracts are partial requirements contracts under which Carvel agrees to purchase from Hood all its ice-cream mix requirements for Connecticut and Massachusetts. These contracts provide, however, that either party may cancel the agreements on ten days' notice. Thus the requirements provision binds Carvel to purchase ice-cream mix from Hood, in the specified area, for only a 10-day period. Clearly, this provision does not constitute a *per se* violation or any violation of the anti-trust laws and is, in all respects, proper and legal. *Tampa Electric Co.* v. *Nashville Coal Co.*, 365 U. S. 320 (1961).

The Court should not be misled into the erroneous conclusion that Hood did a considerable volume of business with Carvel, by petitioners' statements: that Carvel had about 400 franchise stores located in nine or ten states; that Carvel sold to its dealers more than 2,000,000 gallons of mix annually; and that sales of

mix alone—apart from sales of other ingredients, supplies and equipment—were $2,611,324 in 1960 (Pets. Br. 4, 6, 28).

In fact the total volume of business which Hood did with Carvel was small. For the Carvel-Hood supply contracts were only partial requirements contracts. They provided for delivery by Hood of ice cream mix, not to 400 Carvel stores in nine or ten states, but only to stores located in two states, Massachusetts and Connecticut (Ex. 10; R. 252-262; 3186; 253,179).

V

Hood's proof overwhelmingly establishes that the Carvel-Hood contracts and the practices of Hood under them have many patent and necessary virtues and require no redemptive justification. They are affirmatively reasonable and proper for the protection of the legitimate proprietary interests of both Carvel and the store operators themselves. Further, they protect the vital interests of the consuming public. Lacking is any proof by petitioners that they have any adverse effect upon competition—much less a "pernicious" effect.

ARGUMENT

POINT ONE

Hood did not participate in any illegal conspiratorial boycott with respect to direct sales to petitioners or engage in any other violations of the antitrust laws.

I

The economic and social aspects and benefits of the franchise system.

The District Court, in its opinion, clearly delineated the nature of the franchise system and Carvel's

operations as part of it. Thus the Court, among other things, pointed out:

The operation of franchised stores, of which Carvel is an example, is a comparatively recent development. These stores differ from the older established chain store operations in which the managers of the stores are not independent operators. For the franchise operators conduct their businesses as independent contractors although they are subjected to a number of restrictions which tend to create a uniform system of operation. To the public the individual franchise operator appears to be part of a national organization which manufactures and distributes a limited type of product of uniform quality (R. 49-50).

The Court soundly observed further: that the franchise system has the advantage, from the standpoint of our American system of competitive economy, of enabling numerous groups of individuals with small capital to become entrepreneurs; that it creates a class of independent businessmen; that it has had a phenomenal growth particularly in the ice cream industry; and that it provides the public with an opportunity to get a uniform product at numerous points of sale from small independent contractors rather than from employees of a chain. If our economy had not developed the franchise system of operation these individuals would have turned out to be merely employees. The system of operation is, therefore, good for the economy (R. 49-50).

Continuing its delineation the trial court also stated; that the cornerstone of a franchise system

must be the trademark or trade name of a product; and that it is this uniformity of product and control of its quality and distribution which causes the public to turn to franchise stores for their products. This uniformity of stores, of operation and of advertising, and the knowledge of the public of the uniformity and quality of the product is what draws business to the Carvel operators (R. 49-50).

Moreover, the name "Carvel" constitutes, the Court found, a trademark of great value to the defendant companies and to the franchise operators. And it is well established, the Court soundly held, that without abandoning its trademark the owner may license its use to another, but must nevertheless continue its supervisory control. The validity of the franchise agreements and the other agreements between Carvel and the operators must be judged, the Court concluded, in the light of this fundamental rule relating to the protection of trademarks and trade names (R. 50-51).

II

The five Carvel-Hood supply contracts are not illegal *per se* or otherwise.

In 1953 Carvel, which had been developing its chain outlet ice-cream business since about 1934, established Carvel retail stores in the states of Massachusetts and Connecticut. Hood was a well known supplier of quality dairy products in the areas in these states in which the Carvel stores were to be located. Carvel engaged Hood to process for Carvel all of its requirements of a special type and kind of ice-cream mix to be made according to Carvel's special recipe or formula

and to deliver this mix to the Carvel retail stores to be located in Massachusetts and Connecticut.

Accordingly, Hood entered into a supply contract on May 21, 1953 with *Carvel Dari-Freeze Stores, Inc.*, a New York corporation. Subsequent contracts between these parties were entered into January 2, 1954, March 14, 1955 and May 14, 1956.

Hood also entered into a contract with *Carvel Stores of New York, Inc.*, also a New York corporation, on May 14, 1956 (Ex. 10; R. 252-262; 3186). Hood's 1956 contract with Carvel Stores of New York, Inc., is substantially identical in its terms with Hood's May 14, 1956 contract with Carvel Dari-Freeze Stores, Inc.

Both of the May 14, 1956 contracts expired by their terms on May 15, 1957. But the parties thereto have been conducting business pursuant to the terms of those contracts since that date.

The basic provisions here pertinent, which are incorporated in all of the contracts between Hood and Carvel, provide: that Carvel shall furnish Hood with a certain secret and confidential mix formula; that Hood shall manufacture this mix in strict compliance with the formula; that Hood shall sell this mix only to Carvel; and that Hood shall not reveal without Carvel's authorization the contents of the secret formula to any other person.

The successive contracts contain detailed statements with respect to the implementation of these basic provisions. The most detailed statement setting forth the relationship between Hood and Carvel is contained

in the two May 14, 1956 contracts. There is no significant provision in any of the earlier contracts which is not found in these 1956 contracts (Ex. 10; R. 252-263; 177; 3186).

A summary of the material provisions of the two 1956 contracts follows:

1. Hood agrees to manufacture for and sell to Carvel all the Carvel Mix required by Carvel dealers located in the geographic area to be serviced by Hood. Carvel agrees to purchase from Hood all its requirements of Carvel Mix for such stores (para. 1; R. 253).

2. Hood shall manufacture the Carvel Mix according to the secret mix formula furnished to it by Carvel. Hood agrees not to disclose the formula to any unauthorized persons (para. 2; R. 253).

3. The highest quality ingredients shall be used and the mix shall have at least 10% butterfat content (paras. 3(b), 3(c); R. 253-254).

4. Hood shall prepare the mix in batches and shall submit batch reports to Carvel within 24 hours after each batch is prepared (para. 3(e); R. 254).

5. The mix shall be packed in sanitary 10-gallon cans, properly wired and sealed, with tags in the form specified by Carvel attached to each can (paras. 4(a), 4(b); R. 254).

6. Hood may receive orders for mix directly from the Carvel dealers and deliver the mix directly to the dealers in trucks operated by Hood (para. 5(a); R. 254).

Hood agrees to deliver only Carvel Mix to Carvel stores and no other mix or ice-cream preparation (para. 5(f); R. 255).

7. Hood agrees to prepare the Carvel invoices for each delivery of mix to the Carvel stores on invoice forms supplied by Carvel at prices fixed by Carvel (para. 6; R. 255).

8. Hood also agrees to make collections from the store operators of the amounts due Carvel for the mix delivered; to collect, on the request of Carvel, all royalties due to Carvel from Carvel stores; and to deposit the collections in the Carvel bank account (paras. 7(a), 7(c) and 7(d); R-255-256).

9. Hood agrees that it will deliver on a C.O.D. basis when requested by Carvel to do so (para. 7(b); R. 256).

10. Each week Hood is to bill Carvel for shipments made during the prior week. The price to be paid by Carvel to Hood shall equal the cost of the ingredients plus 17½% thereof to cover Hood's labor, overhead and profit. Hood is also to receive 50¢ per 10-gallon can as consideration for delivering the mix directly to the stores, billing, collections of payments, etc. (paras. 8(a), 8(b), 8(c) and 8(d); R. 256-257).

11. Carvel retains the right to inspect Hood's plant and to return any mix delivered in unsanitary cans or which does not conform with Carvel's special formula (paras. 10, 11; R. 259).

12. Hood agrees "that it will not manufacture, or represent that it can or will manufacture, the Carvel Mix for sale to any person, firm or corporation other than Carvel or its designated Carvel Stores" (para. 12; R-259-260).

These provisions evidence no illegal agreement or practice by Hood.

III

The following facts were established without contradiction by stipulations entered into between Hood, the petitioners and Carvel (R. 177-180), by the uncontroverted testimony of Hood's witness, Walter Simonsen (R. 180-196), or by both.

Numerous stipulations as to conceded facts were entered into between Hood and the petitioners and were read into the record at the trial (R. 177-180). Carvel joined in those stipulations (R. 179).

Moreover, Walter Simonsen testified on behalf of Hood and was cross-examined both by petitioners and by Carvel (R. 180-196).* Mr. Simonsen has been Hood's sales manager for its ice-cream mix sales division for almost 17 years and has been engaged in the ice-cream business for approximately 25 years (W. S., R. 180). He has sole supervision of the business relations and contacts between Hood and Carvel and also acts in an advisory capacity with respect to the manufacture of Carvel Mix (W. S., R. 180-181). Mr. Simonsen is thoroughly familiar with Carvel's special formula for its mix (W. S., R. 194).

The following facts were established beyond question by the evidence so adduced:

Hood was not a party to and had no knowledge of Carvel's franchise agreements or other contracts with its store operators.

Hood did not participate in any way in the negotiations for, or in the preparation or execution of, any of the franchise agreements between the petitioners and

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* The testimony of Mr. Simonsen will be indicated by his initials, *W. S.*

Carvel or any of such other documents as may have been signed or exchanged by or between Carvel and any of the petitioners at the time of or in connection with the execution of the respective franchise agreements (Stip., R. 178; W. S., R. 184).

Hood had no knowledge of any of the franchise agreements between Carvel and the operators of Carvel stores, or of any of the provisions contained therein, prior to the commencement of these actions (W. S., R. 184).

Hood had no knowledge of any of the documents signed by or exchanged between Carvel and the operators of Carvel stores at the time of or in connection with the execution of the franchise agreements between Carvel and the operators of Carvel stores prior to the commencement of these actions (W. S., R. 184).

Hood never saw and had no knowledge of the Carvel Standard Operating Procedure Manual and nothing whatsoever to do with the manner in which the Carvel stores were operated.

The petitioners received from Carvel a copy of the Carvel Standard Operating Procedure Manual, referred to as the "S.O.P. Manual" (Stip., R. 178).

Hood did not participate in any way in the preparation or distribution of the Carvel S.O.P. Manual or of any addition or supplement thereto (W. S., R. 185).

Hood had no knowledge of the Carvel S.O.P. Manual, or of any addition or supplement thereto, or of any of the provisions contained therein, prior to the commencement of these actions (W. S., R. 185).

None of Hood's officers or employees gave any instructions to any of the petitioners relating to the operation of the Carvel stores (W. S., R. 185).

The operators of Carvel stores are required under the laws of the State of Connecticut and the Commonwealth of Massachusetts to obtain manufacturers' licenses (Stip., R. 179).

A special Carvel tag and a distinctive Carvel seal were affixed to each can of Carvel Mix delivered by Hood to the Carvel stores (Hood Ex. 4; R. 325; 175; 3553; W. S., R. 183-184).

The Carvel Mix manufactured by Hood for Carvel is processed according to Carvel's secret special formula and differs from all other ice-cream mixes manufactured by Hood.

Carvel Mix is manufactured by Hood in batches separate from any other mix (W. S., R. 182).

A batch report containing a list of ingredients and a laboratory test of the product is sent to Carvel by Hood with respect to each batch of Carvel Mix manufactured by Hood (W. S., R. 181-182).

Carvel Mix is manufactured by Hood according to a secret special formula furnished by Carvel which differs from all formulae used by Hood in the preparation of other than Carvel Mix (W. S., R. 182, 190-191).

Carvel supplies Hood with the stabilizer and emulsifier which Hood uses in the preparation of Carvel Mix (W. S., R. 181, 194-196).

Hood did not participate in the determination of the prices at which Carvel sold its ice-cream mix to the store operators or in the determination of any of the other conditions of sale.

Carvel notified the operators of the Carvel stores of the prices the operators were to pay Carvel for Carvel Mix (Hood Ex. 1, R. 320, 174; 3550; Stip., R. 179).

Carvel then notified Hood of such changes in the price at which Carvel Mix, to be delivered by Hood, would be sold by Carvel to the operators of Carvel stores (W. S., R. 186).

Carvel alone determined the conditions under which it would grant the operators of Carvel stores a discount on purchases of Carvel Mix and fixed the amount of such discount (W. S., R. 186).

Carvel alone determined when a store was to be placed on a C.O.D. basis in connection with purchases of Carvel Mix from Carvel and notified the operator of the Carvel store of Carvel's determination by sending a written C.O.D. notice to him (Hood Ex. 2, R. 321-323; 3550; W. S., R. 174-175; 186-187).

Carvel then notified Hood that a Carvel store to which Hood delivered mix had been placed on a C.O.D. basis by sending to Hood a copy of the C.O.D. notice sent by Carvel to the operator of that Carvel store, with Carvel's instructions to Hood, if any, regarding the allowance of a discount and the manner of collecting the royalties payable by the operator of the Carvel store to Carvel (Hood Ex. 2, R. 321-323; 3550; 174-175; W. S., R. 186-187).

Carvel notified Hood that a Carvel store to which Hood delivered mix had been removed from a C.O.D.

basis by sending to Hood a copy of the notice of removal from C.O.D. sent by Carvel to the operator of the Carvel store (Hood Ex. 3, R. 324, 174-175; 3553; W. S., R. 187-188).

Carvel alone determined the form of the Carvel invoices to be presented to the operators of Carvel stores with each delivery of Carvel Mix (Hood Exs. 5, 6, 7, R. 326-328; 175-177; 3554-3556; W. S., R. 188).

The original Carvel invoice was delivered by Hood to the operator of the Carvel store (W. S., R. 189).

A copy of each Carvel invoice was sent by Hood to Carvel (W. S., R. 189).

Hood has never participated in any way in the determination of the prices charged by Carvel to the operators of Carvel stores for Carvel Mix (W. S., R. 185).

The operators of the Carvel stores acknowledged receipt of the merchandise mentioned in each invoice by signing the delivery receipt at the bottom of each Carvel invoice (W. S., R. 189).

The amounts collected by Hood from the store operators on Carvel invoices were deposited by Hood in Carvel's bank account (W. S., R. 189).

Hood did not participate in the determination of the prices at which Carvel Frozen Dairy Products, made with Carvel Ice-Cream Mix as a component, were sold to the public.

In preparing products to be sold to the public, the operators of Carvel stores are required to perform the following operations, among others, with respect to the

Carvel Ice-Cream Mix delivered to them (Stip., R. 178-179; W. S., R. 189-192):

(1) The mix is flavored and other ingredients, such as fruits, nuts, candies, cereals, etc., are added as needed.

(2) The mix is processed in a Carvel Mix machine to obtain soft ice-cream.

(3) To obtain hard ice-cream, the soft ice-cream is subsequently frozen in a separate freezer.

(4) The soft or hard ice-cream so manufactured is shaped, decorated, garnished with syrups, fruits, nuts, marshmallow, and other toppings and then packaged, as may be required, to make the various products described in the Carvel S.O.P. Manual.

The Carvel stores do not sell ice-cream mix to the public in the form in which it is delivered to the stores (W. S., R. 189).

Hood has never participated in any way in the determination of the prices charged to the public by the operators of Carvel stores for frozen dairy products sold at Carvel stores (W. S., R. 193).

POINT TWO

Carvel's requirement that Hood deliver no ice-cream mix or ice-cream preparation other than Carvel Mix to the Carvel stores is necessary and proper to protect both Carvel and the consuming public and is in no sense illegal.

The 1956 Carvel-Hood supply contracts provided that Hood will deliver no ice-cream mix or ice-cream

preparation other than Carvel Mix to Carvel stores (para. 5(f); R. 255).* There are cogent reasons for those provisions, among them the necessity to protect the public against possible fraudulent imposition.

All Carvel stores display a large exterior sign bearing the name "CARVEL" and in most instances a replica of a Carvel ice-cream cone. Moreover, the name "CARVEL" appears on much of the equipment contained within the stores and is imprinted upon the menus, bulletins, placards, and advertisements placed in and about the stores. Thus, the name "CARVEL" has come to be identified indelibly in the public mind only with quality ice-cream products sponsored by Carvel and sold in Carvel stores (R. 49-50).

The public has a right to expect, and undoubtedly does expect, that Carvel stands behind the products which are sold at these stores, and that it exercises proper control to insure that these products conform to high standards of taste, quality and healthfulness.

Moreover, each store operator benefits from the continued high reputation of Carvel. For customers who have no knowledge of the particular store or of its franchised operators will, nevertheless, stop and make purchases because of the Carvel reputation (R. 50).

In order to insure that all products sold at Carvel stores will conform to Carvel's high standards and fulfill the public expectations which Carvel has created,

* All references to Carvel-Hood contract paragraph numbers refer to the May 14, 1956 contracts (Ex. 10; R. 252-263).

Carvel itself must control the supply of ice-cream mix to the stores. Therefore, although the mix is processed by Hood for certain Carvel stores in Connecticut and Massachusetts, Hood is required to follow the special and confidential formula originated and supplied to it by Carvel (para. 2, R. 253).

Moreover, Carvel also requires that Carvel Mix be prepared in batches separately from any other mix, and that a batch report be mailed to Carvel by Hood within 24 hours after the preparation of each batch of mix (para. 3(e), R. 254) and Carvel retains the right to inspect Hood's plant, distributing depots and all materials, machines and equipment used in the manufacture of the Carvel Mix (para. 10, R. 259).

Further, in order to insure that the store operators will use only Carvel Mix and not some other mix prepared according to different or varying standards, Carvel has contracted with Hood that Hood will deliver only Carvel Mix and no other ice-cream mix or ice-cream preparation to Carvel stores (para. 5(f), R. 255).

Thus, it is readily seen that this requirement is soundly in the public interest. For Hood to breach its agreement with Carvel, as petitioners seem to contend it should, might well make Hood an accomplice in a fraudulent imposition upon the public.

Any misrepresentation of food products, particularly of highly perishable products such as frozen dairy products, is a matter of vital public concern. The public must rely on the integrity of the organiza-

tion under whose name and sponsorship a food product is sold, for protection from inferior, unsavory, and possibly unhealthful products. That this is so is confirmed by the following provision which appears in Section 19-202 of Chapter 341 of the General Statutes of Connecticut:

> "* * * No person, shall sell, offer for sale or advertise for sale any frozen dessert or frozen dessert mix if the brand name of the frozen dessert or frozen dessert mix or the label upon it or the advertising accompanying it gives a false indication of the origin, character, composition or place of manufacture, or is otherwise false or misleading in any particular. * * *" (R. 332)

Substantially identical language appears in Section 65L (b) of Chapter 94, Title XV of the General Laws of Massachusetts (R. 330).

If Hood were to deliver an ice-cream mix other than the Carvel Mix, to Carvel stores and, if such mix were to be placed in Carvel Mix machines and the products made therefrom sold to the public under the Carvel name, such conduct could subject both Hood and the store operators to liability under Massachusetts and Connecticut statutes.

Clearly the requirement that Hood deliver no ice-cream preparation other than Carvel Mix to the Carvel stores is not "pernicious" in any sense and, on the contrary, possesses affirmative virtues. It merely would prohibit a practice which would be so clearly in violation of the public interest that it could not possibly be justified on any theory.

POINT THREE

The provision that Hood manufacture Carvel Mix exclusively for Carvel, in accordance with Carvel's special secret formula, in which Carvel has a proprietary interest, is also patently proper.

The 1956 Carvel-Hood contracts provide that Hood shall manufacture a particular type of ice-cream mix exclusively for Carvel, according to specifications provided by Carvel (paras. 1, 2, R. 253).

The lack of authority for a contention that this type of arrangement constitutes *per se* violation of the antitrust laws is indicated by the terms of a consent decree entered in *United States* v. *Ekco Products,* 1957 CCH Trade Cases, para. 68,768 (N. D. Cal., 1957), which provides, among other things:

> "Nothing in this Section VIII shall be deemed to prevent defendants from contracting for the manufacture *exclusively for them* of specific silicone compounds in accordance with the formulas and specifications furnished by defendants." (Emphasis supplied; p. 73,129).

Certainly the Justice Department would not have consented to a decree which specifically permitted a practice which might, on any theory, be considered a *per se* violation of the antitrust laws.

The legality of the exclusive arrangement here involved is further clear from *Packard Motor Car Co.* v. *Webster Motor Car Co.,* 243 F. 2d 418 (D. C. Cir. 1957), *cert. denied,* 355 U. S. 822.

In the *Packard Motor* case, Zell Motor Car Company, the largest of three Baltimore Packard dealers,

told Packard that Zell was losing money and would give up its dealership unless Packard gave it an exclusive contract. Packard agreed that it would do so and told the plaintiff, Webster, and the other Baltimore dealer that their contracts would not be renewed. After Webster protested and threatened suit Packard offered Webster the usual one-year renewal but refused to promise more. Packard agreed with Zell that this would be Webster's last renewal. Webster declined Packard's offer, quit the business, brought suit and was awarded damages.

The District Court held that the jury on the facts there presented "had a right to reach the conclusion" that the agreement was unreasonable.

But on appeal, the Circuit Court reversed the decision below and granted judgment in favor of Packard. Judge Edgerton discussed the question arising under Section 1 of the Sherman Act as follows (pp. 420-421):

> "* * * When an exclusive dealership 'is not part and parcel of a scheme to monopolize and effective competition exists at both the seller and buyer levels, the arrangement has invariably been upheld as a reasonable restraint of trade. In short, the rule was virtually one of *per se* legality' until the District Court decided the present case. . . . The fact that any other dealers in the same product of the same manufacturer are eliminated does not make an exclusive dealership illegal; it is the essential nature of the arrangement."

In the *Packard* case the elimination of competition was the immediate object and direct result of the exclusive arrangement. Zell, which sought the exclusive

dealership, actually asked Packard to eliminate the plaintiff, Webster, as a competitor in the Baltimore area, and its request was granted. Nevertheless, the Circuit Court held that the exclusive dealership was not only legal, but *per se* legal. Here, the exclusive arrangement between Hood and Carvel did not so eliminate competition, actual or potential, and possesses none of the characteristics which might even raise a serious question of illegality.

Other authorities which unmistakably indicate the legality of the Carvel-Hood supply contracts include: *Bascom Launder Corp.* v. *Telecoin Corporation*, 204 F. 2d 331 (2d Cir. 1953), *cert. denied*, 345 U. S. 994, and *United States* v. *Bausch & Lomb Optical Co.*, 45 F. Supp. 387 (S. D. N. Y. 1942), *aff'd by an equally divided Court*, 321 U. S. 707 (1944).

In *Bascom Launder*, this Court ruled that in view of the controlling authority of the *Bausch & Lomb* case, the District Court's charge to the jury that an exclusive sales agreement, similar to Hood's arrangement with Carvel, was a *per se* violation of the Sherman Act constituted reversible error.

Discussing the exclusive arrangement involved in the *Bausch & Lomb* case, in his opinion in *Bascom Launder*, Judge Frank commented as follows (p. 335):

> "There a manufacturer agreed to sell one of its products to no one other than a single distributor. Judge Rifkind—* * * said, [45 F. Supp. 398] that the Sherman Act was not violated, because the manufacturer had no monoply of the product, and the 'restraint of trade' was (a) ancillary to *a reasonable main purpose*—a source of supply to the

distributor—and (b) fairly protective of that distributor's interests but not so large as to interfere with the interests of the public." (Emphasis supplied)

Judge Frank then went on to state that in view of the controlling authority of *Bausch & Lomb*:

"The contract in the instant case [Bascom] was therefore not unlawful in and of itself. The plaintiffs could win only if they proved (1) that Bendix had a monopoly in fact of the product it sold to Telecoin and/or (2) the exclusive arrangement, as carried out, was *without a reasonable economic basis and merely served as an instrument for unduly restraining trade. . . .*" 204 F. 2d at p. 335 (Emphasis supplied)

The exclusive arrangement here under examination does not fall within any of the prohibitions set forth by Judge Rifkind and by Judge Frank. The reasonable purposes and economic bases of the Carvel-Hood arrangement are, we submit, beyond question. And there is no contention that Hood had a monopoly of any product. As to this the District Court commented:

"Finally, the plaintiffs made no showing that they could not obtain non-Carvel merchandise from other suppliers or that the refusal of the supplier defendants to sell them such merchandise deprived the plaintiffs of any access to these goods." (R. 53-54)

Carvel, in order to protect its own interests, the interests of its store operators, and the interests of the consuming public, had to assure itself of a dependable and efficient source of supply of its own special formula

ice-cream mix, containing only the highest quality ingredients. These reasonable and beneficent results Carvel achieved by: (1) closely supervising the manufacturing process; (2) by requiring that Hood use a stabilizer and emulsifier which was supplied by Carvel; and (3) by providing that Hood was to sell Carvel Mix only to Carvel and that Carvel might return to Hood any mix, packed in unsanitary containers or not conforming to Carvel's special formula.

POINT FOUR

The provision that Carvel purchase all of its requirements for Carvel Mix, in a specified area, from Hood is in all respects reasonable and proper, and could not possibly constitute a violation of the Antitrust Laws.

The 1956 Carvel-Hood supply contracts are partial requirements contracts. They provide that Carvel will purchase from Hood all its requirements of Carvel Mix in a specified area, Connecticut and Massachusetts. Obviously the volume of business which Hood does with Carvel is small, as we have shown (*supra* 10-11). This provision of the contract does not constitute a *per se* violation or any violation of the antitrust laws.

The fact that requirements contracts are not *per se* illegal was made irresistibly clear by the decision of the United States Supreme Court in *Tampa Electric Co.* v. *Nashville Coal Co.*, 365 U. S. 320 (1961).

The clear holding of the *Tampa* case is that exclusive dealing arrangements of the type here involved are not *per se* illegal and will not be found to be illegal

under either Section 3 of the Clayton Act or Sections 1 and 2 of the Sherman Act, unless:

> "* * * the court believes it probable that the performance of the contract will foreclose competition in a substantial share of the line of commerce affected." 365 U. S. at p. 327

The contract under attack in the *Tampa* case provided that the seller, Nashville Coal Co., would sell and the buyer, Tampa Electric Co., would purchase for a *twenty-year period* all of Tampa's coal requirements to be used in a new power station. The anticipated maximum requirements amounted to 2,250,000 tons of coal annually or more than three times the total annual consumption of coal in peninsular Florida as of 1958 (excluding the new power station). The maximum price was $8.80 per ton.

Thus, competition in $19,800,000 worth of coal per year might be foreclosed by the terms of the contract. The anticipated maximum yearly tonnage to be delivered under the contract was found to approximate 18% of the total market for coal of the same type in the States of Georgia and Florida. And that yearly tonnage approximated 1% of the total market production of all producers in the whole Appalachian coal area, which market involved "an annual trade in excess of 250,000,000 tons of coal and over a billion dollars" (p. 334).

Yet in upholding the validity of this rather extraordinary contract, so much more drastic in its terms and effect than that here involved, Mr. Justice Clark stated (p. 334):

> "The 20-year period of the contract is singled out as the principal vice, but at least in the case of

public utilities the assurance of a steady and ample supply of fuel is necessary in the public interest."

In marked contrast to the twenty-year term of the contract in the *Tampa* case, the May 14, 1956 contracts between Hood and Carvel provide that *either* party may cancel the agreement on 10 days' notice (para. 13(a), R. 260).* Thus if some competitor of Hood should offer Carvel more favorable terms Carvel would be free to accept the offer on 10 days' notice to Hood. In effect, the requirements provision binds Carvel to purchase its requirements in the specified area for only a 10-day period. Clearly this provision is in all respects proper and legal.

POINT FIVE

Both the Court of Appeals and the District Court unanimously held that the Carvel-Hood supply contracts involved neither *per se* violations nor indeed any violations of the antitrust laws.

As we have shown (*supra,* 4-5) only those agreements or practices have been held to be *per se* violations of the antitrust laws, which experience has shown: (1) to be so "pernicious" in their effect on competition; and (2) so lacking in "any redeeming virtue"; that (3) their unreasonableness and consequent illegality is conclusively presumed;—without the necessity for any further inquiry or for any consideration of any business excuse or justification for their use.

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*The March 14, 1955 contract contains the same 10-day cancellation provision; the May 21, 1953 and January 2, 1954 contracts were terminable at will by either party.

Clearly, neither the Carvel-Hood supply contracts nor any of Hood's conduct pursuant to them fall in that category. On the contrary, the proof *affirmatively* establishes: that these contracts have many patent virtues and require no redemptive justification; and that they are all reasonable and proper for the protection of the legitimate proprietary interests both of Carvel and of the store operators themselves—as well as the interests of the consuming public. And there is no proof whatsoever that the contracts have any adverse effect upon competition, much less a "pernicious" effect.

We have found no cases which deal with contracts of the precise type here under examination. Certainly petitioners have produced no authority for the contention that these contracts or any of the conduct of Hood constitute *per se* violations or, indeed, any violations of the antitrust laws. We submit that the highly pertinent authorities which we do cite lead irresistibly to the conclusion that these contracts are entirely proper and legal.

The Opinion of the District Court.

Sustaining the legality of the Carvel-Hood supply contracts the District Court said (R. 52):

> "It is difficult to see exactly what plaintiffs consider to be the illegality of the dairy companies' contractual arrangements with Carvel, . . . the plaintiffs failed to prove that such provisions were in fact illegal. See *Tampa Electric Co.* v. *Nashville Coal Co.*, 365 U. S. 320 (1960); *United States* v. *Columbia Steel*, 334 U. S. 495 (1948).
>
> As to the alleged refusal to deal direct, certainly the plaintiffs had no right to purchase Car-

vel Mix, made pursuant to Carvel's secret formula, other than on the terms which Carvel prescribed. Carvel had the right to bind the dairy companies to manufacture this secret formula mix solely for its own use or for persons whom it might designate. No outsider or any of the plaintiffs, without Carvel's approval, had the right to require the dairy companies to sell them this special formula mix. This conclusion seems obvious."

With respect to petitioners' alleged second possible basis for liability the District Court further said (R. 53):

"As a second possible basis for liability, the plaintiffs appear to rely on the fact that the supplier defendants would not sell them ice cream mixes other than the Carvel Mix . . . or other than Carvel approved merchandise . . . As previously mentioned, the Hood-Carvel supply contracts provided that Hood would deliver no ice cream preparation other than Carvel Mix to Carvel stores . . ."

The Court then found that petitioners' argument that the provisions of the supply contracts are illegal must fail for several reasons and pointed out, among other things: that petitioners had failed to prove that they had asked any of the supplier defendants to make sales of unapproved merchandise and that they refused to do so; and that the petitioners had made no showing that they could not obtain non-Carvel merchandise from other suppliers or that the refusal of the supplier defendants to sell them such merchandise deprived them of any access to these goods. In conclusion the Court stated:

". . . plaintiffs' evidence failed to make out any illegal conduct on the part of the supplier defend-

ants and the case against them must therefore be dismissed" (R. 54).

The Unanimous Opinion of the Court of Appeals as to Hood.

The Court of Appeals unanimously affirmed, in all respects, the foregoing views of the District Court. As to the agreement that Hood would produce ice cream mix under Carvel's secret formula which Hood pledged itself not to divulge, Chief Judge Lumbard, speaking for the Court of Appeals, said (R. 449):

> "With regard to Carvel's contracts with Hood and Rakestraw, which produced Carvel ice cream mix in accordance with a secret formula which they pledged not to divulge, it seems perfectly clear that as the possessor of a secret formula for its ice cream mix Carvel enjoyed the right to sell it to whomever it chose, and this right was not diluted by its agreement with Hood and Rakestraw to produce the mix. Carvel was free to insist that Hood and Rakestraw produce the mix solely for Carvel and subject to Carvel's wishes as to its disposition."

As to the agreement by Hood not to sell non-Carvel products to the store operators, the Court of Appeals further said (R. 449):

> "As for the provision in the contracts between Carvel and Hood, Rakestraw, Eagle, a cone manufacturer, and Mohawk, a manufacturer of paper products, that the suppliers would not sell non-Carvel products to the individual dealers, we find no merit in the plaintiffs' claims. Carvel cannot be considered in competition with these suppliers from whom it purchases Carvel supplies, and such

an agreement not to deal, even if established, when effected by non-competing enterprises is not illegal. See, e.g., *Packard Motor Car Co.* v. *Webster Motor Car Co.*, 243 F. 2d 418 (D. C. Cir.), cert. denied, 355 U. S. 822 (1957). Moreover, the plaintiffs failed to prove that they were foreclosed from alternate sources of supply or indeed that the supplier defendants themselves had been requested to make sales to the dealers and had refused."

The District Court had similarly held that even if the supplier defendants agreed with Carvel not to sell other than Carvel approved products to the franchise operators such agreement by two persons not in competition with each other would not have constituted an illegal boycott, citing: *Packard Motor Car Co.* v. *Webster Motor Car Co.*, 243 F. 2d 418 (D. C. Cir.), *cert. denied*, 355 U. S. 822 (1957); *Schwing Motor Car Co.* v. *Hudson Sales Corp.*, 138 F. Supp. 899 (D. Md.) *aff'd per curiam*, 239 F. 2d 176 (4th Cir. 1956), *cert. denied*, 355 U. S. 823 (1957). (R. 53)

CONCLUSION

Petitioners have been operating their stores under franchise agreements into which they willingly entered. They chose to do business under Carvel's name, insignia and reputation and to hold out to the public that they dispensed only Carvel Frozen Dairy Products. Now, apparently, they find that their agreements involved duties, as well as rights, and that their profits are not those for which they had hoped. They have brought these actions and have made defendants of all who, by the widest stretch of imagination, might be thought to have contributed to their disappointment.

Patently Hood was made a party defendant solely because of petitioners' determination to catch within an alleged conspiracy dragnet all who might conceivably have any connection with Carvel. But Hood's situation presents separate and clearly defined questions, and its position is irrefutably supported by stipulated facts and by Simonsen's uncontradicted testimony. As both the Courts below unanimously held, there is, as a matter of fact and law, no merit in petitioners' claims against Hood.

The judgments of the Court of Appeals for the Second Circuit which affirmed the dismissal of the complaints as against the respondent, H. P. Hood & Sons, Inc. should be affirmed.

Dated: New York, N. Y.
February 15, 1965

Respectfully submitted,

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MOTION FILED

FEB 17 1965

Supreme Court of the United States

OCTOBER TERM, 1964.

No. 355.

BERNARD SUSSER, *et al.*,

Petitioners,

against

CARVEL CORPORATION, *et al.*,

Respondents.

MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* AND BRIEF OF INTERNATIONAL FRANCHISE ASSOCIATION, INC., AS *AMICUS CURIAE*.

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February 17, 1965.

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Petitioners,

against

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Respondents.

MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*.

INTERNATIONAL FRANCHISE ASSOCIATION, INC., hereby respectfully moves for leave to file a brief as *amicus curiae* in support of the decision of the Court of Appeals. Copies of this motion and the attached brief have been sent to the attorneys for the petitioners and the respondents.

International Franchise Association, Inc. has over 90 member firms, many of them small businesses, located throughout the United States. These firms are engaged in selling, and in assisting and licensing others to sell, many different types of goods and services to the public. Among the goods and services which are made available through franchisees of member firms are bicycles, rental automobiles, hamburgers, home-delivered dinners, ice cream, donuts, dry cleaning and home cleaning services, pancakes, root beer, temporary office personnel and employment agency services, paints, automobile supplies, and tools. Respondent Carvel Corporation is not a member of International Franchise Association, Inc. The membership also does not include the large oil companies which franchise service stations, or the large automobile and truck manufacturers which franchise dealers in their products.

The basic question at issue in this case is the legality of certain provisions of the Carvel franchise agreements.

The litigants represent only the divergent views of a few Carvel franchisees, the Carvel companies and certain of their suppliers. However, the decision will necessarily affect numerous other franchising arrangements. This is all the more so since the Brief for Petitioners asserts violation of *per se* antitrust rules. If the Court upholds such assertions, members of International Franchise Association, Inc., having franchising arrangements against which such rules are invoked may be precluded from asserting differences in circumstances because such differences may be held immaterial under *per se* rules.

Moreover, the consequences of an extension of *per se* rules to the setting of franchising arrangements could be ruinous to many members of International Franchise Association, Inc. and jeopardize the continuation of a method of business operation which has proven valuable and effective in establishing thousands of small businesses throughout the country.

For these reasons and for the additional reasons set forth in the accompanying brief and in the statement to Subcommittee No. 4 of the House Select Committee on Small Business annexed thereto, International Franchise Association, Inc. respectfully requests permission to file the accompanying brief as *amicus curiae*, setting forth its views with respect to the basic question at issue in this case.

Respectfully submitted,

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Dated: February 17, 1965.

Supreme Court of the United States

OCTOBER TERM, 1965

No. 355

BERNARD SUSSER, *et al.*,

Petitioners,

against

CARVEL CORPORATION, *et al.*,

Respondents.

BRIEF OF INTERNATIONAL FRANCHISE ASSOCIATION, INC., AS *AMICUS CURIAE*.

Interest of International Franchise Association, Inc.

This case is concerned with the legality of provisions in franchise agreements between the Carvel respondents and independent dealers who manufacture and sell frozen dairy products, chiefly soft ice cream. Such manufacture and sale takes place in buildings which are specifically designed for the purpose and are decorated and identified by Carvel signs and insignia.

The dealers, referred to herein as franchisees, are obligated to buy certain supplies from Carvel or Carvel-approved sources. They are also obligated to conduct their businesses in accordance with certain rules prescribed in a manual furnished them.

In certain respects, the Carvel franchising arrangement is similar to franchising arrangements offered by many of the members of the International Franchise Association, Inc. Though the details of the arrangements differ widely,

the following general features are common to many arrangements:

(1) Assistance in Opening a Business.

Franchising prospers on the desire to have one's own business, and its extraordinary growth in the post-war years is due to the ability of franchisors, by virtue of their accumulated experience, to considerably reduce the franchisee's risk of failure in starting his business.

(2) Chain-Type Operation.

Chain-type operation is an important tool in reducing the risk of business failure. A ready-made reputation, built up by the franchisor and existing franchisees, may be transferred to a new franchisee. Because of identity or similarity of trade names and often buildings or other distinguishing features at all franchised locations, the new franchisee can look forward to the patronage of customers who have been favorably impressed with the quality of goods and services received at other franchised locations.

(3) Standardization of Quality.

The benefits derived from chain-type operation can be maintained only if all franchisees maintain quality standards. Lack of uniformity in quality would deprive the public of what it may reasonably expect from chain-type operation. It will also quickly tarnish the reputation of the franchised product or service to the detriment of all franchisees and the franchisor.

The members of International Franchise Association, Inc. have pledged to properly and effectively serve the needs of the ultimate user or consumer, to provide complete and realistic information to prospective franchisees, to draw up franchise agreements which are fair to the franchisee and which are fully understood by him prior to signature, to sell

to him only products which are of the represented quality and which are manufactured with ingredients or materials of approved standards, and in other respects follow the highest standards of business conduct. They believe that the franchising system as practiced by them is in the public interest, that no basis exists for extending *per se* antitrust rules to their franchising arrangements, and that any such extension would seriously threaten the continued existence of the franchising system.

ARGUMENT.

I.

Franchising Is in the Public Interest.

Experience has proven that the franchise method of operation satisfies a public demand. Particularly in the case of highway establishments, it satisfies the demand for establishments serving quality products and easily recognizable as such by travellers. In the case of other establishments, franchising enables independent merchants to offer the public products and services of standardized and high quality. Such a merchant obtains access to trade secrets, methods of operation and other information developed as a result of the experience of many similar merchants over a long period of time, permitting him to offer quality products and services. He thus acquires a running start in an important aspect of his business.

Equally important, for the small businessman with limited capital, franchising is an extremely effective means of avoiding business failure. A trade magazine recently reported that the rate of failures among new restaurants in New Jersey exceeded 50%, while the rate of failure among new franchisees was estimated at more nearly 2%. (Modern Franchising, November-December 1964, p. 4) The

franchisor will, of course, discourage the inadequately capitalized operator. The franchisor will frequently contribute his experience in making such vital business decisions as the street location of a business, the maximum rental that can safely be paid, the amount that can reasonably be expended for construction and decoration, the extent of necessary training of personnel, and the amount which should be expended in advertising. An unwise decision as to any of these matters could make the difference between success and failure.

Once established, the franchisee is encouraged to make use of up-to-date business methods; he is helped in controlling costs and quality; and he is assisted with advertising and promotion. He acquires in substance many of the benefits of large-scale operation, and is enabled to compete effectively.*

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* The following are examples of contributions which particular members of International Franchising Association state they make to the success of franchisees:

(1) Sun-X International began as a local glass tinting business in Houston, Texas in 1955 with capital of $7,000. Because of the impracticality of travelling great distances to tint windows, Sun-X began franchising others to enter the business in other areas. It offers its franchisees the necessary materials and specialized equipment, sales aids, advertising materials and a sales and technical training program. It also furnishes a technical manual and operations manual and makes available to franchisees prompt answers to questions not covered in the manuals. It was able to franchise others abroad as well as in the United States. Its success in doing so won it the Presidential E award for Export Achievement.

(2) Snap-on Tools Corporation manufactures hand tools and related automotive service equipment. Its home office is Kenosha, Wisconsin. Its services to its franchised dealers include operation of training schools, credit assistance, provision of an operating manual, specialized promotions, display recommendations, equipment and similar assistance.

(3) Duraclean Company of Deerfield, Illinois offers carpet and furniture cleaning franchises to franchisees operating in 50 states and approximately 25 foreign countries. New franchisees receive

In return for its contributions, the franchisor may be paid a franchise fee at the outset of its relationship with the franchisee. It may also permit all or part of its compensation to depend upon the success of the business and stipulate to accept a percentage of its receipts. It may also derive compensation from furnishing supplies, equipment, or services to the franchisee on a profitable basis.

The manifest advantages of franchising to the public, to the franchisee and to the franchisor are more fully stated in the appended statement of the International Franchise Association to Subcommittee No. 4 of the House of Representatives Select Committee on Small Business. These mutual advantages account for the commercial success franchising has achieved in recent years. As shown in the Appendix, franchising accounts for an annual dollar volume of over $10,000,000,000 even after excluding the large and somewhat unique categories of gasoline stations and automobile and truck dealerships.

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training in the home office training school and elsewhere, instruction manuals, chemical supplies, equipment, advertising materials and many sales aids, including sound color film strips and professional display units. Also available at all times are the technical, advertising, promotional and managerial advisory services of the franchisor.

(4) Mister Donut of America of Westwood, Massachusetts and its related companies franchise donut shops throughout the country and abroad. Among the services provided to franchisees are assistance in selecting a location, furnishing of building designs, selection of contractors, training, aid in equipment financing, special formulations and recipes, managerial and advertising assistance, and furnishing of supplies.

II.

Experience does not warrant the extension of *per se* antitrust rules to franchising.

It is reasonable for a franchisor to protect the reputation and good will which play such an important role in the franchising system by taking steps to assure that their value is not compromised by substandard operations. Indeed, as suggested in the Court of Appeals' opinion herein, such steps may be necessary to protect the very validity of the trademarks employed. Accordingly, there can be no doubt that it is reasonable to insist on standardization of operation, and to include in franchising arrangements restraints on the franchisee's operations for this purpose.

In considering such restraints, three important questions arise:

(1) Is such a restraint lawful if it goes beyond the minimum necessary for such purpose?

It is suggested by a judge of the Court of Appeals herein that the restraints imposed by Carvel in the name of quality went beyond what was "reasonable and necessary". However, it is respectfully submitted that what is reasonable should not be confined to what is necessary. F[redacted]eople would want to ride in an elevator designed to carry no more than their own weight. Conservatism demands a margin of safety. A margin of safety is equally necessary in protecting the reputation of a franchised product. Whether the margin of safety is reasonable in a particular case may depend upon many factors. Examples of such factors include:

(a) The nature and length of the experience of the franchisor in dealing with other franchisees. See, for

example, the treatment of restraints in the initial years of a business in *United States* v. *Jerrold Electronics Corp.*, 187 F. Supp. 545 (E. D. Pa. 1960), *aff'd*, 365 U. S. 567 (1961);

(b) The difficulty and expense of enforcing narrower restraints. The concurring opinion in the Court of Appeals herein suggests such difficulties; and

(c) The extent of any probable adverse effect on competition following from a broader restraint. The language of Section 3 of the Clayton Act speaks of a tendency "to substantially lessen competition" or to create monopoly. This Court has recently interpreted the Sherman Act to apply where "significant competition" is eliminated (*United States* v. *First National Bank & Trust Co. of Lexington*, 376 U. S. 665 (1964)).

(2) Is such a restraint lawful if it is also used to secure a source of income?

It is doubtful that serious antitrust issues would be posed by even the most exacting quality standards alone. If the franchisor does not require the franchisee to buy from him to meet such standards, restraints imposed on the franchisee to enforce the standards would seldom be questioned. Usually it is only when the franchisor elects simultaneously to standardize quality and derive a portion of his compensation from the sale of products to the franchisee, that questions arise as to whether the compulsory purchase is an unlawful exclusive dealing or tying arrangement.

It is respectfully submitted that a decision making compulsory purchases automatically unlawful would elevate form over substance and also impose unnecessary burdens on the parties. The source from which the franchisor

derives his compensation is partly a matter of form. If he is not permitted to sell exclusively, he may charge a higher fee or royalty. If the franchisor is obligated to take this part of his compensation as a franchise fee or royalty, however, the effect may be to raise the total cost of operation and make it less competitive with other forms of business. If, on the other hand, the franchisee may be obligated to buy only ingredients supplied by the franchisor, the franchisor's burden of inspection and quality checking is reduced and the amount he must charge the franchisee for such inspection is correspondingly reduced. At the same time, his profits from the sales permit a smaller fee or royalty. It follows that if a compulsory purchase provision in a franchise agreement is to be considered as an unlawful exclusive dealing or tying arrangement in all cases involving a certain level of sales, the effect may be to the long-range disadvantage of both franchisor and franchisee.

By contrast if, as is believed, the legality of such a provision depends upon its reasonableness in the circumstances, numerous factors may be taken into consideration. These would include, for example, whether the compulsory purchase requirement reasonably serves to promote lawful standardization, whether alternative methods of assuring such standardization and adequate compensation to the franchisor are feasible, and whether the stage of development of a franchised operation is such that these alternatives should be offered to the franchisees. Each case should be judged on its particular facts, and as these facts can be expected to vary considerably from case to case, the application of *per se* antitrust rules may retard rather than promote economic opportunity.

(3) May such a restraint be categorized as a "tying" agreement?

The rules relating to "tying" agreements, as set forth in *Northern Pacific Railway Co.* v. *United States*, 356 U. S. 1 (1958), and *United States* v. *Loew's, Inc.*, 371 U. S. 38

(1962), are peculiarly inappropriate to the type of franchise arrangement described above. Such an arrangement is not by its nature separable so that parts of it may be "tied" to other parts within the meaning of these cases. As noted above, the franchisor risks loss of its trademarks if it attempts to license them alone. It must insist on the maintenance of quality. Moreover, franchise arrangements of the type described may not be assumed to be designed for the purpose of artificially grouping wanted and unwanted commodities or services which can be and normally are sold separately. The franchisor offers specialized, interrelated services to the franchisee and much of their value is attributable to their specialized, interrelated character. The franchisor may be less qualified to render only part of the services. If a merchant desires only assistance in finding a suitable location, for example, he would normally consult a real estate broker rather than a franchisor. If he were interested only in advice with respect to record-keeping, he would normally consult an accountant. The franchisor is qualified to advise most usefully with respect to both these subjects only as they relate to operating a particular franchise. Even more clearly than in *Times Picayune Publishing Co.* v. *United States,* 345 U. S. 594 (1953), the rationale of the "tying" cases does not justify treating franchising arrangements as involving two or more different and separable commodities or services which are improperly grouped together.

In addition, as noted in the *Northern Pacific* case, *supra,* there is no restraint on competition even when separable services or commodities are grouped for sale, if competitors are ready to sell such services or commodities individually. There is no basis for believing that franchisors are without competition, either from other franchisors or from other forms of businesses.

Finally, it is submitted that franchising, having experienced its most dramatic growth in the United States in

recent years (Hancock, *The Franchise System of Distribution*, November 1963), deserves the benefits of more experience and fuller inquiry before any *per se* antitrust rules are formulated to govern its operations. The caution which this court observed in *White Motor Company* v. *United States*, 372 U. S. 235 (1963), in directing a fuller inquiry before ruling on contentions of *per se* illegality in the distribution of trucks, is even more appropriate before extending *per se* rules to the context of the franchising arrangements described herein.

III.

The consequences of any such extension could be ruinous.

If typical provisions of franchise agreements were held to be unlawful *per se*, the effect on the franchise industry would be disastrous. Existing franchisors might be faced with staggering liability, casting into doubt their ability to survive, much less to carry the benefits of franchising to additional prospective franchisees.

Furthermore, the consequences of even a solely prospective rule against compulsory purchases by franchisees, or other restraints which may be reasonable in particular cases, may be to hamper the ability of franchisors to sell and operate, and limit the ability of franchisees to compete effectively. Higher costs to franchisors mean higher costs for franchisees. This places them at a competitive disadvantage with integrated chain stores, often their most powerful competitors.

As a member of the Court stated in a dissenting opinion in *Standard Oil Co.* v. *United States*, 337 U. S. 293 (1949), the restraints displaced by particular rulings may be relatively innocuous as compared with the growth of integrated power which may be the only alternative. Department stores and chain stores already abound on the American

scene.* The tendency toward integration in manufacturing and selling has been noted frequently by this Court and by Congress. Franchising may well be the last frontier for the small businessman in the United States. There is neither need nor warrant for curbing franchisors in imposing restraints, so long as they are reasonable in the circumstances.

Conclusion.

It is respectfully urged that the laws which were in large part intended to protect small businessmen should not be construed so as to impede a sound and successful means of enabling them to meet the severe competition created by the rising tide of concentration in our economy.

Respectfully submitted,

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Dated: February 17, 1965.

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* Franchising has been described as "a lifesaver for the independent wholesale and retail merchant, in the face of increasing competition from corporate chains and discount operations." W. P. Hall, "Franchising—New Scope for an Old Technique," Harvard Business Review, January-February 1964, p. 60.

APPENDIX.

STATEMENT OF THE INTERNATIONAL FRANCHISE ASSOCIATION TO THE SUBCOMMITTEE NO. 4 HOUSE OF REPRESENTATIVES SELECT COMMITTEE ON SMALL BUSINESS

November 8, 1963

Mr. Chairman and members of the Subcommittee on Distribution, we are pleased to have this opportunity to present testimony to you on the franchise method of distribution on behalf of the International Franchise Association, Inc.

The International Franchise Association is a trade association representing the franchise industry. Our membership is composed of companies who utilize the franchise method of distribution for the marketing of both goods and services in a broad variety of industries throughout the American economic spectrum. The founding of the Association in 1960, was largely the result of the concern of a growing industry with the need for better franchising methods and the development of more information within the industry to promote and encourage standards and good business practices by franchising companies, and to help increase the general understanding of the franchise method of distribution. Our rapidly expanding Association presently has approximately 100 franchising and allied member companies.

My statement will not contain comments with respect to the two bills on which this Committee is developing testimony, HR-3559 and HR-3562, but rather will review for the benefit of the Committee, the development of the franchise method of distribution and its growing importance to the nation's economy. In the preparation of this statement we have drawn heavily upon a Small Business Administration sponsored research project conducted under the direction of Dr. R. S. Hancock, of the University of Minne-

sota, School of Business, entitled "The Franchise System of Distribution", which is now being published.

Franchising is one of the most rapidly growing methods of distribution in the United States today. Franchising is not new, but it has had unusual growth during the last decade. It is a widely used system for distribution of manufactured goods and of services. Its impact upon the growth of the United States and its important place in the nation's economy should be fully appreciated by your Committee as a background to its deliberations.

WHAT IS FRANCHISING?

Franchising is a system of distribution, or marketing, of goods and services, through an arrangement whereby a franchisor, who has developed a pattern or a format for a particular type of business, extends to franchisees who are independent small businessmen in the true sense of the word, the opportunity and right to conduct such a business. (Frequently the use of trademarks, patents, copyrights, advertising materials, and other legally protected products, methods, goods or names are included in the franchise package.)

Successful franchising is based on

(1) a contractual relationship clearly spelling out the responsibility and obligations of both parties, and

(2) a strong and continuing cooperative relationship between franchisor and franchisee.

Frequently, the physical layout and appearances are similar in all establishments within a particular franchise group, such as distinctive buildings, signs, colors, packages, uniforms, bottles, trucks and business methods. In addition to standardization of physical appearances, most often merchandise or services sold, operating procedures and methods are also standardized to a high degree thus affording the public the advantage of being able to rely on a familiar name for quality and uniformity of product and service.

The franchisee remains an independent businessman, but the securing of franchise rights places specific responsibilities on him, such as a minimum investment for the franchise which may include standard inventory or equipment package, the utilization of standardized and proven promotional efforts and programs, product quality, use of names and trademarks, established management procedures and, in some instances, the payment of royalties or franchise fees. The franchise system sets up an inter-relationship between the franchisor and the franchisee in which a proven package is sold to the franchisee. This package usually includes goods or services, training, promotional techniques, standard management techniques, continued management aid and assistance, together with the right to distribute or sell products and/or services for which the franchisor will receive such considerations as a franchise fee and/or royalty on sales or a profit from the sale of equipment or products to the franchisee, although in some instances joint advertising funds are the only advantage sought by the franchisor. It is a system in which both parties recognize that their mutual success and welfare are interdependent and closely related.

INDUSTRIES USING THE FRANCHISE METHOD OF DISTRIBUTION

While franchising is certainly not limited to the industries which are listed below, the major or an important share of these industry groups distribute the goods or services produced through franchised outlets and they are thus among the most familiar to the American public. These industry groups are:

Auto, Truck and Trailer Rentals
Automobile and Truck Dealers
Candy and Confectioneries
Carpet and Upholstery Cleaning Services
Coin-Operated and Regular Laundries & Dry Cleaning Services
Drug Stores
Gasoline and Oil Service Stations

Grocery Stores
Hardware Stores
Hearing Aids
Moving Companies
Roadside Food, Beverage and Soft Ice Cream Dispensing Restaurants
Soft Drink Bottlers
Swimming Pools
Temporary Help Services
Tires and Auto Accessories
Tool and Equipment Rentals
Variety Stores
Water Conditioning Systems and Services

WHY HAS FRANCHISING GROWN?

There are many important reasons why franchising has become a widely used method of distribution.

(1) Franchising permits greater economic expansion within given limits of capital, time and personnel over other systems of distribution, particularly as compared with manufacturer or supplier-owned outlets. Capital requirements, personnel requirements, real estate and other requirements to build a distribution system of wholly owned retail outlets is beyond the reach of many market suppliers. Franchising provides the supplier with the opportunity to distribute his product or service with substantially reduced capital and personnel responsibilities, still retaining a certain degree of control through supervision and guidance. Through a franchise arrangement, the supplier secures the "assistance" of the franchisee by the franchisee's purchase of equipment or other requirements, inventory, handling personnel problems, and operation of the business outlet.

(2) Competition from large regional or national corporate chains in hardware, food, drug and variety chains during the 1920's stimulated defensive measures by wholesalers in these lines who formed voluntary

chains based on franchise agreements between the dealer and the wholesaler to permit active and effective competition with chains and to preserve the integrity and the ability of the small businessman to compete. The growth of franchised food, drug, automotive parts, hardware and variety stores during the 1920's and the following years was prompted by the growth of large corporate chains, and the establishing of a system of independent businessmen affiliated with a wholesaler through a franchise contract provided the same standardized lines, professional management and promotional systems, merchandising programs and other assistance necessary to effectively compete with the chains.

(3) Unusual product requirements and specialized knowledge require that some products or services be marketed singly without being mixed with a variety of other commodity classes. If a product requires unusual services or has a distinct characteristic, it sometimes cannot be mixed with other items and still be successfully marketed. Examples of such products are laundry and dry cleaning systems, gasoline service stations, prepared food, beverages, swimming pools, soft ice cream and rug and upholstery cleaning. With such products, franchising permits the focusing of marketing attention on the product itself, undiluted by competing products.

(4) Franchising offers an opportunity for people to "be their own boss" or "have my own business" under circumstances which are more favorable for success and growth with a proven franchise which offers demonstrated public acceptance and business know-how which would otherwise have to be acquired or purchased with considerable risk to the small businessman. This allows the franchisee to use already tested business methods and thus minimize his capital costs. This nation has been built on the desire for independence, individual accomplishment, and becoming one's own boss. The rate of new business formation in this country is eloquent testimony to this desire. Franchising offers

a convenient and economic means for the filling of such a drive or desire with a minimum of risk and investment and maximum opportunities for success through the utilization of a proven product or service and marketing method.

THE SIZE OF THE FRANCHISE INDUSTRY

For statistical purposes, the United States Government does not presently distinguish beween businesses which utilize the franchise method of distribution and those who do not. However, estimates of the industry are presented here, based on U. S. Government statistics and actual or estimated industry figures, for those industries which make up component parts of the franchise industry. The approximate total size of the industry, at retail sales value is in excess of 59 billion dollars.

Table I below lists the various industries involved, the approximate number of franchisees and the estimated dollar volume.

TABLE I

Industries utilizing the franchise method of distribution, in whole or in part, with estimated number of franchised outlets, and approximate retail dollar volume.

	Industry	Franchised Outlets	Annual Dollar Volume
1.	Automobile & Truck Dealers	33,000	$35,000,000,000
2.	Carpet & Upholstery Cleaning Services	4,000	100,000,000
3.	Coin-Operated & Regular Laundry and Dry Cleaning Services	35,700	509,000,000
4.	Gasoline & Oil Service Stations	206,302	14,178,000,000
5.	Grocery Stores	16,000	4,450,000,000
6.	Hearing Aids	3,500	70,000,000
7.	Moving Companies	5,000	1,000,000,000
8.	Roadside Food, Beverage & Soft Ice Cream Dispensing Restaurants	24,590	1,409,611,000
9.	Soft Drink Bottlers	4,000	2,001,000,000
10.	Swimming Pools	1,000	40,000,000
11.	Temporary Help Services	500	100,000,000
12.	Variety Stores	2,400	150,000,000
13.	Water Conditioning Systems & Services	2,300	207,000,000
	TOTAL	338,652	$59,214,627,000

TABLE IA

Industries utilizing the franchise method of distribution in whole or in part, on which reliable figures or estimates are not now available.

Auto, Truck and Trailer Rental
Candy and Confectioneries
Drug Stores
Hardware Stores
Tire and Auto Accessories
Tool and Equipment Rental

Franchising represents an outstanding example, perhaps unique, wherein the interest of the small businessman and the large manufacturer or service industry can be a joint interest.

FRANCHISING IN THE U. S. ECONOMY

From the point of sales volume alone, the franchise method of distribution is an extremely important part of the economy of the United States. As we have noted, major industries in the United States utilize either in total or in large part, this method of distribution as the most satisfactory means of marketing products or services. The number of people employed in distribution through franchising, both on the level of the manufacturer or franchisor and on the level of retailer or franchisee, comprises an important and influential part of the American economy.

Of even greater significance, however, is the important function performed by franchising in providing vast business opportunities in our free enterprise economy. In such an economy, a dynamic and flexible distribution system is vitally important. Franchising fulfills this important requirement particularly in the area of selective distribution by facilitating the entry of both franchisor and franchisee into a franchising system on a larger scale per dollar, with less capital investment and a minimum of risk. Both the franchisor and the franchisee have their mutual success closely linked. Both are independent entrepreneurs, highly motivated toward success and both have unusual growth opportunities for individual achievement. Franchising thus

encourages expansion of free enterprise on both the level of the franchisor, who by conceiving, evolving and proving a sound marketing program, can expect to expand successfully and at a more rapid rate through franchising. The franchisee, with a minimum of investment, can buy a franchise covering a widely promoted and accepted product and receive the benefits of a sophisticated and well developed business and management system which gives a substantial guarantee for a successful business venture to the man who has sufficient motivation and drive to effect the program. The franchise story is replete with examples of successful franchise programs and the United States has substantially more independent businessmen today than would have been possible without this unique distributive system. In fact, every member of the International Franchise Association represents a story of successful free enterprise in action and in turn can point to a substantial number of success stories among their franchisees. Table II below lists some of the advantages offered to the franchisee by the franchisor and vice-versa.

TABLE II

ADVANTAGES TO FRANCHISEE

1. Nationally known name and trademark.
2. Consumer publically recognized system and reputation.
3. National publicity and promotion.
4. Nationally recognized product or service.
5. Standard product and quality.
6. Standard management system and methods.
7. Standard accounting method and inventory control.
8. Aid in financing business.
9. Bulk purchasing advantages and merchandise buying techniques and sources.
10. Proven system of operations, business manuals, sales kits, etc.
11. Scientific site selection for locations and assistance with leasing arrangements.
12. Psychological testing for screening franchisees.
13. Benefit of counsel of business experts' experience not otherwise available.
14. Training programs for franchisees and key employees.
15. Design of facilities and advice on fixtures, displays, signs, etc.
16. Planning and advice on local promotion of business including opening of shop and proven sales techniques.
17. Guidance in selection of inventory.

ADVANTAGES TO FRANCHISOR

1. Investment capital to expand production, promotional and merchandise facilities.
2. Local, interested management, with cost and sales awareness.
3. Acceptance in the community as a local business.
4. Limited payroll and insurance costs.
5. Better market communications—local franchisee to manufacturer or supplier.
6. Individual ownership, giving strong motivation to success.
7. Thorough fast and selective distribution.
8. Reduced operating expenses.

Six areas have been identified as areas of distinct contribution made by franchising to the U. S. economy and to American business. These are as follows: (1) *The large number of franchise businesses currently in operation in the United States are extremely important to our nation's economy,* and many industries have developed to their present level by successfully utilizing the franchising method of distribution demonstrating its key role in their success. There are at least 338,000 franchises in the United States who represent an approximate volume of business of over $59 billion dollars. (2) *Higher standards of retail and service operations have been achieved through franchising.* The franchisee has higher standards of operation because the franchisor has established requirements for (a) standardized quality of goods and services, (b) meeting nationally accepted and advertised standards of business procedures, and (c) attractive, convenient, well located and easily identified establishments. These factors contribute to the rapid growth and to the stability of a franchising system. (3) *Efficiency of business management has been improved through franchising.* Franchising systems are based on proven and effective management techniques which have been standardized as much as possible to assure their efficient and effective operation. Franchising companies on a continuing basis require the re-evaluation of methods of recruiting, training and managing. (4) *A broader range of goods and services are available to the consuming public*

through franchising. The franchising concept, as we have noted, encourages the creation of new business enterprises, both on the franchisor and the franchisee level. Its history is replete with the development of industries from ideas. (5) *Economic stability of retail outlets has been increased through franchising.* Committee members are familiar, I'm sure with the high mortality rate in small business, and the fact that the majority of all retail failures are attributable to inexperience, incompetence and other factors which relate to management competence. Because of the key role played by the franchisor, a franchising company must exercise extreme caution in selecting properly qualified franchisees, and it must provide tested operating methods and management procedures as well as a continuing program of training and development. This fact of economic life dramatizes the close working relationship of franchisor and franchisee in achieving their common goal of business success. This relationship created by the franchise environment helps to reduce business failures and promote business stability on a wide basis in the United States. (6) *Franchising makes an important contribution to the economy of this country by broadening the economic base through the encouragement of small businesses.* Franchising, based on multiple ownership of its many parts, encourages many individual entrepreneurs to enter the distribution field and to compete successfully with other means of distribution on an effective, efficient, free enterprise basis. Franchising has thus encouraged the growth of small business on a sound and efficient basis. Franchising looks forward to continued growth, continued expansion, and a continued contribution to the growing strength of our economy.

In closing, we refer the Committee to an observation by Judge Dawson of the U. S. District Court in the *Bernard Susser* vs. *Carvel Corporation, et al.,* case in which he succinctly stated the fundamental of franchising: "The franchise method of operation has the advantage, from the standpoint of our American system of competitive economy, of enabling numerous groups of individuals with small cap-

ital to become entrepreneurs. The franchise business has had a phenomenal growth in the ice cream history. If our economy had not developed that system of operation these individuals would have turned out to have been merely employees. The franchise system creates a class of independent businessmen: it provides the public with an opportunity to get a uniform product at numerous points of sale from small independent contractors, rather than employees of a vast chain. The franchise system of operation is therefore good for the economy."

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 355

BERNARD SUSSER, *et al.*,

Petitioners,

—v.—

CARVEL CORPORATION, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT RAKESTRAW'S DAIRY PRODUCTS, INC.

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Other Authorities:

Note, *Concerted Refusals to Deal Under the Federal Antitrust Laws*, 71 Harv. L. Rev. 1531 (1958) 9

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 355

BERNARD SUSSER, *et al.*,

Petitioners,

—v.—

CARVEL CORPORATION, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT RAKESTRAW'S DAIRY PRODUCTS, INC.

Question Presented

Does the evidence against the Rakestraw dairy upon which the *Pierce, Giberman,* and *Pazdro* petitioners rely, a Rakestraw-Carvel contract in which the dairy agreed to produce secret formula Carvel ice cream mix for Carvel and to deliver that Carvel mix and no other to Carvel stores in its Pennsylvania area, establish that Rakestraw was engaged in a conspiracy to boycott those petitioners of the kind which is *per se* in violation of the Sherman Act?

ARGUMENT

The courts below correctly held that there had been no showing of participation by the Rakestraw dairy in any conspiratorial boycott against the petitioners violative of the antitrust laws.

The petitioners who were plaintiffs in the *Pierce, Giberman,* and *Pazdro* actions alleged that contracts between Rakestraw's Dairy Products, Inc. ("Rakestraw") and Carvel, in which the dairy agreed to produce secret formula Carvel ice cream mix for Carvel and to deliver that Carvel mix and no other to Carvel stores in its area (Pl. Ex. 15; R. 337, 16), constituted boycott agreements which were in violation of the Sherman Act.

The private antitrust suits were tried before the District Court for the Southern District of New York on the issue of liability alone; the plaintiffs limited their evidence to written agreements and other documents, and made no claim other than that their evidence would establish *per se* violations of the antitrust laws (Pretrial Order No. 5; R. 148). After a trial before District Judge Dawson sitting without a jury, the three complaints against Rakestraw and other defendants were dismissed, and the Court of Appeals for the Second Circuit affirmed the judgments.

The respondent Rakestraw dairy processes dairy products at its plant in Mechanicsburg, Pennsylvania, and sells and distributes those products in the Pennsylvania area. In 1956 Rakestraw contracted with Carvel Stores of New York, Inc., that it would make a perishable fluid ice cream mix for Carvel, following Carvel's secret formula and using stabilizer and emulsifiers furnished by Carvel, and would deliver that Carvel mix to Carvel stores in the area to be serviced by Rakestraw (Pl. Ex. 15; R. 337, 16, 183, 199).

Upon the trial of these cases the 1956 Rakestraw-Carvel contract was introduced into evidence as part of Plaintiffs' Exhibit 15 (R. 337, 16). That exhibit is the only piece of evidence which relates in any way to Rakestraw; the petitioners made no attempt to show that Rakestraw was aware of the identity or even the existence of any other person with whom Carvel may have contracted for the supply of cones, syrups, toppings, or paper products, or for the supply of ice cream mix in areas other than Pennsylvania. The District Court noted of the evidence introduced by the plaintiffs against the dairy defendants Rakestraw and Hood:

> "The plaintiffs do not contend that the supplier defendants engaged in any common conspiracy with Carvel and with each other in furtherance of any illegal end. No evidence of any such conspiracy was offered; the plaintiffs relied on the agreements between Carvel and the supplier defendants to establish the unlawful conspiracies" (R. 51).

It is on this Rakestraw-Carvel supply contract that petitioners would predicate Rakestraw's liability for alleged *per se* violations of the antitrust laws, *per se* violations having been described by this Court as:

> "agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use." *Northern Pac. Ry.* v. *United States*, 356 U. S. 1, 5 (1958).

The contract provisions singled out by petitioners as illegal *per se* according to the stern test of *Northern Pac.*

Ry., supra, are paragraph 1 (R. 338), in which Rakestraw agreed to manufacture and sell to Carvel all the "Carvel Mix" required by Carvel dealers in the area serviced by Rakestraw, and subparagraph 5(f) (R. 341), in which Rakestraw agreed to "deliver only Carvel Mix to Carvel Stores, and no other ice cream mix or ice cream preparation of any kind."

The District Court and all of the judges of the Court of Appeals concluded, contrary to petitioners' contentions, that these Rakestraw-Carvel contract provisions are not violative of the Sherman Act. Both courts agreed that Carvel was free to insist that Rakestraw produce Carvel's secret formula mix for sale solely to Carvel and to no one else (District Court Opinion, R. 52; Court of Appeals Opinion, R. 449). They further agreed that, so far as direct sales of non-Carvel ice cream to petitioners were concerned, petitioners had failed to show that Rakestraw was ever asked to make such sales and that it had refused to do so; and that in any case such an agreement by Rakestraw and Carvel, being two persons not in competition with each other, would not have constituted an illegal boycott (District Court Opinion, R. 53; Court of Appeals Opinion, R. 449). It is respectfully submitted that these determinations of the courts below with respect to respondent Rakestraw are correct in all respects, and should be affirmed.

A. The contract provision requiring Rakestraw to sell secret formula Carvel Mix solely to Carvel is patently proper.

Chief Judge Lumbard wrote for the Court of Appeals:

> "With regard to Carvel's contracts with Hood and Rakestraw, which produced Carvel ice cream mix in accordance with a secret formula which they pledged

not to divulge, it seems perfectly clear that as the possessor of a secret formula for its ice cream mix Carvel enjoyed the right to sell it to whomever it chose, and this right was not diluted by its agreement with Hood and Rakestraw to produce the mix. Carvel was free to insist that Hood and Rakestraw produce the mix solely for Carvel and subject to Carvel's wishes as to its disposition" (R. 449).

District Judge Dawson wrote to the same effect:

"As to the alleged refusal to deal direct, certainly the plaintiffs had no right to purchase Carvel Mix, made pursuant to Carvel's secret formula, other than on the terms which Carvel prescribed. Carvel had the right to bind the dairy companies to manufacture this secret formula mix solely for its own use or for persons whom it might designate. No outsider or any of the plaintiffs, without Carvel's approval, had the right to require the dairy companies to sell them this special formula mix. This conclusion seems obvious" (R. 52).

No extensive citation of authority is necessary for the proposition that it is patently proper for Rakestraw to agree to sell only to Carvel the ice cream mix it makes according to a secret formula divulged to it by Carvel upon just such a condition.

Neither can this Pennsylvania dairy's promise to produce for Carvel all of the secret-formula Carvel Mix required by Carvel stores in the area be characterized as an exclusive dealing arrangement proscribed by the Clayton Act. As the trial court noted (R. 52), petitioners did not even allege in their complaints that the provisions of the contract under which Rakestraw agreed to furnish all of Carvel's requirements for Carvel Mix were illegal in them-

selves, and upon the trial of the cases petitioners failed to prove that the "all requirements" provision was in fact illegal by the tests of *Tampa Electric Co.* v. *Nashville Coal Co.*, 365 U. S. 320 (1961), and *United States* v. *Columbia Steel*, 334 U. S. 495 (1948).

B. The contract provision requiring Rakestraw to deliver only Carvel Mix to Carvel stores is intended to prevent fraudulent substitution of an inferior mix, not to prohibit Rakestraw from selling non-Carvel branded ice cream to petitioners directly.

Petitioners contend that the contract provision in which Rakestraw and Carvel agree that Rakestraw "will deliver only Carvel Mix to Carvel Stores, and no other ice cream mix or ice cream preparation of any kind" (R. 341) is *per se* in violation of the Sherman Act because, they say, it obliges Rakestraw to refrain from selling non-Carvel ice cream directly to petitioners. Rakestraw respectfully submits that, as a matter of contract interpretation, that contract provision in fact requires nothing of the kind: The provision is contained in a contract treating only of the manufacture and delivery of secret formula Carvel Mix, and the clause could only have been intended to prevent Rakestraw from substituting inferior mixes for the high quality Carvel ice cream mix in the course of delivery.

It should be noted as an initial matter that, as both of the courts below observed, petitioners never showed that Rakestraw had been requested to make sales directly to them and had refused (R. 53, 449). District Judge Dawson also said (R. 63):

> "As a practical matter, it may be noted that there is no evidence that the Carvel operators are particularly interested in selling other kinds of ice cream. The

testimony that was given during the trial of the fraud aspect of these cases indicated that the operators were more concerned with expanding their line of business into other fields than with selling additional brands of ice cream."

To determine the intent and meaning of a particular provision it must be read in conjunction with the entire contract. Subparagraph 5(f) of the Rakestraw-Carvel contract in issue (R. 341) is the sixth section of a paragraph entitled "Delivery of Carvel Mix" which sets forth the manner in which Carvel Mix shall be ordered, transported, and delivered, and Rakestraw's duties in connection therewith. The full paragraph reads in its entirety (R. 340-41):

"5. (a) Carvel Dealers in the Area may transmit orders directly to the processor for their requirements of Carvel Mix. The Processor shall fill said orders promptly and deliver the same to the respective Carvel Stores as soon as possible.

"(b) The Processor shall transport and deliver the Carvel Mix to the respective Carvel Stores, pursuant to orders received as aforesaid, in suitable trucks operated by the Processor, which shall not be used for any other purpose. Said trucks shall be painted all white at the Processor's expense and be identified with Carvel's insignia at the cost and expense of the Processor. Identification insignia shall be supplied by Carvel at its own cost and expense.

"(c) The Processor shall procure a delivery receipt for each delivery made and send same to Carvel.

"(d) Prior to the fifth business day of each month, the delivery agent shall submit to Carvel, a Statement

of the total cans of Carvel Special Formula Mix delivered to each store during the previous month.

"(e) The Processor will not itself represent, or permit any of its employees to represent that the Processor or any of its employees are the representatives of Carvel, and will indemnify and hold Carvel and its affiliates free and harmless from any liability which may be incurred by any act of any such person in violation of the terms of this paragraph; without limiting the generality of the foregoing, the Processor shall save Carvel free and harmless from any liability for damage to person or property caused by the act of any route man or delivery man driving one of the trucks marked with Carvel's insignia, as aforementioned.

"(f) The Processor agrees that he will deliver only Carvel Mix to Carvel Stores, and no other ice cream mix or ice cream preparation of any kind.

"(g) It is understood and agreed that the Processor's obligation to manufacture and supply Carvel Mix, as set forth in this agreement, shall at all times be subject to delays that may be due to strikes, acts of God, official embargoes, or wartime restrictions."

Clearly, the covenant by Rakestraw to "deliver only Carvel Mix to Carvel Stores, and no other ice cream mix or ice cream preparation of any kind" was intended, as part of Carvel's program to ensure quality control and uniformity of product, to preclude Rakestraw from substituting some other mix for the Carvel-formula mix in orders from Carvel dealers for mix to be used in the distinctive Carvel swirl-ejection freezers for the preparation of an ice cream product to be sold under the Carvel trademark. The object of the Rakestraw-Carvel contract is to

effect manufacture and delivery of Carvel Mix and payment to Rakestraw therefor; it is not to prohibit Rakestraw from selling to petitioners or to anyone else, for its own account, other mixes which might be used for the production of a non-Carvel branded ice cream, or other packaged brands of hard ice cream.

C. Even if the Rakestraw-Carvel contract were deemed to prohibit Rakestraw from dealing with or selling to petitioners directly, it would not be illegal *per se* under the antitrust laws.

1. *An agreement by two persons not in competition with each other cannot constitute an illegal boycott.*

Assuming *arguendo* that the Rakestraw-Carvel agreement requires Rakestraw to refrain from dealing with or selling to petitioners directly, those contract provisions do not in the circumstances constitute *per se* violations of the antitrust laws.

In the first place, the Rakestraw-Carvel contract, so interpreted, prohibits only one party, Rakestraw, from dealing with petitioners. An agreement between two parties that prohibits only *one* of the parties from dealing with third persons is not a "group boycott" illegal under the antitrust statutes. See Note, *Concerted Refusals to Deal Under the Federal Antitrust Laws*, 71 Harv. L. Rev. 1531 n. 1 (1958) ("An agreement between *A* and *B* that *A* will not deal with *C* is not a group boycott since there is not the requisite refusal by two or more parties to deal with another."); *Packard Motor Car Co.* v. *Webster Motor Car Co.*, 243 F. 2d 418 (D. C. Cir.), *cert. denied*, 355 U. S. 822 (1957). And it is well established that, absent a monopolistic purpose, an individual refusal to do business with

any person is not a violation of the antitrust laws, *United States* v. *Colgate & Co.*, 250 U. S. 300 (1919).

Both of the courts below so held with respect to the Rakestraw-Carvel agreement. The District Court said (R. 53): "[E]ven if the supplier defendants agreed with Carvel not to sell other than Carvel approved products to the franchise operators, such an agreement by two persons not in competition with each other would not have constituted an illegal boycott." And Chief Judge Lumbard wrote for the Court of Appeals (R. 449): "Carvel cannot be considered in competition with these suppliers from whom it purchases Carvel supplies, and such an agreement not to deal, even if established, when effected by non-competing enterprises is not illegal."

Petitioners' brief to this Court rings with ominous mention of a "concert of action of the suppliers" and a "Carvel supplier entente" (Petitioners' Brief, p. 51). Undoubtedly this is done in an effort to make applicable to the Rakestraw-Carvel contract cases like *Associated Press* v. *United States*, 326 U. S. 1 (1945), and *Klors, Inc.* v. *Broadway-Hale Stores, Inc.*, 359 U. S. 207 (1959). But in these Carvel cases at bar there is not the slightest indication, even inferentially, that Rakestraw was aware of any arrangements Carvel might have made with suppliers of cones, syrups, toppings, or paper products, or with suppliers of perishable ice cream mix in places outside of Rakestraw's Pennsylvania delivery area. There is not here the mischief of a concerted refusal to deal of the kind proscribed by the antitrust laws.

2. The Rakestraw-Carvel contract had a reasonable economic basis and did not serve as an instrument for unduly restraining trade.

Even if it be conceded that the Rakestraw-Carvel contract was in a sense in restraint of trade because it was

an exclusive arrangement for the supply of ice cream mix, that exclusive arrangement, as carried out, had a reasonable economic basis and did not serve as an instrument for unduly restraining trade, *United States* v. *Bausch & Lomb Optical Co.*, 45 F. Supp. 387 (S. D. N. Y. 1942), *aff'd by an equally divided Court*, 321 U. S. 707 (1944); *Bascom Launder Corp.* v. *Telecoin Corp.*, 204 F. 2d 331 (2d Cir.), *cert. denied*, 345 U. S. 994 (1953).

In *Bascom Launder, supra,* a treble damage suit, the Court of Appeals held that it was reversible error for the trial court to charge the jury that an exclusive distributing agreement between the defendant Telecoin Corporation and Bendix Home Appliances, Inc., the manufacturer

> "'amounted to a contract, combination and conspiracy in restraint of trade or commerce in violation of the Sherman Act as a matter of law'" (204 F. 2d at 334).

The Court, relying on *United States* v. *Bausch & Lomb Optical Co., supra,* held that the exclusive arrangement would be unlawful only if plaintiffs proved that Bendix had a monopoly in fact of washing machines, or that the exclusive arrangement, as carried out, was

> "without a reasonable economic basis and merely served as an instrument for unduly restraining trade" (204 F. 2d at 335).

In *United States* v. *Bausch & Lomb Optical Co.*, 45 F. Supp. 387 (S. D. N. Y. 1942), *aff'd by an equally divided Court*, 321 U. S. 707 (1944), the defendant Bausch & Lomb had an exclusive manufacturing arrangement with the defendant Soft-Lite Lens Co. pursuant to which Bausch & Lomb manufactured pink tinted lenses exclusively for Soft-Lite and agreed not to market or manufacture the lenses for anyone else. In addition, Bausch & Lomb owned con-

trolling stock in six wholesale distributing companies which were customers of Soft-Lite. The trial court found that Bausch & Lomb was "vitally interested" in the prices set by Soft-Lite on sales to wholesalers and in the prices charged to consumers (45 F. Supp. at 393) and that Bausch & Lomb was "satisfied that Soft-Lite would so market the product as to justify" the exclusive manufacturing arrangement (*id.* at 395).

The District Court dismissed the complaint against Bausch & Lomb despite its granting of relief against Soft-Lite, and this Court affirmed the dismissal, thus holding that "the agreement of Bausch & Lomb not to sell tinted glass or lenses to any competitor of Soft-Lite and not to compete with Soft-Lite in the marketing of any pink tinted lens" (321 U. S. at 718-719) does not unreasonably restrain commerce in violation of the Sherman Act. As Judge Rifkind's opinion in the district court pointed out (45 F. Supp. at 398-99);

> "In determining whether a restraint is unreasonable the guidance of the classic opinion in United States v. Addyston Pipe & Steel Co., 6 Cir., 1898, 85 F. 271, 46 L. R. A. 122, affirmed 175 U. S. 211, 20 S. Ct. 96, 44 L. Ed. 136, is still available. It is too well known to require quotation here. The standards there set forth appear in substantially similar form in the Restatement of the Law of Contracts of the American Law Institute, §§515, 516. §516 reads as follows:
>
> "'§516. Instances of Reasonable Restraints.
>
> "'The following bargains do not impose unreasonable restraint of trade unless effecting, or forming part of a plan to effect, a monopoly: (a) A bargain by the transferor of property or of a business not to compete with the buyer in such a way as to injure the value of the property or the business sold;

"'(b) A bargain by the buyer or lessee of property or of a business not to use it in competition with or to the injury of the seller or lessor;

"'(c) A bargain to enter into partnership with an actual or possible competitor;

"'(d) A bargain by a partner not to interfere by competition or otherwise with the business of the partnership while it continues, or subject to reasonable limitations after his retirement;

"'(e) A bargain to deal exclusively with another;

"'(f) A bargain by an assistant, servant, or agent not to compete with his employer, or principal, during the term of the employment or agency, or thereafter, within such territory and during such time as may be reasonably necessary for the protection of the employer or principal, without imposing undue hardship on the employee or agent.'

* * * * * *

"In the case at bar the main purpose of the contract is to provide a source of supply for Soft-Lite. The restraining covenant is for the protection of the purchaser who is spending large sums to develop his good will and enlarge the public patronage of a relatively new article of commerce. The arrangement, though not a partnership in legal form, is functionally a joint enterprise in which one will produce and the other market the commodity. United States v. Addyston Pipe & Steel Co., supra, 85 F. at page 281.

"It is clearly a 'bargain to deal exclusively with another,' Restatement, supra, §516.

"It is not necessary to find and I do not find that Soft-Lite's specifications for the glass constituted a

> secret formula for the protection of which a restraining covenant would be proper. There is nothing contrary to public policy in the arrangement. Nothing in the evidence indicates that Bausch & Lomb enjoyed a monopoly in the manufacture of glass for lenses, whether pink or otherwise. On the contrary, the evidence is clear that other manufacturers of lenses have had access to pink glass from other sources and that the success of Soft-Lite has stimulated emulation and competition. See Federal Trade Commission v. Raymond Bros.-Clark Co., 1924, 263 U. S. 565, 44 S. Ct. 162, 68 L. Ed. 448, 30 A. L. R. 1114.
>
> "I conclude that the exclusive arrangement between Bausch & Lomb and Soft-Lite taken independently of the distribution system is not violative of the Sherman Act."

Similarly the main purpose of the Rakestraw-Carvel agreement is to provide a source of supply for Carvel. The restrictive covenant, if there be one, is "for the protection of the purchaser [Carvel] who is spending large sums to develop his good will . . . ." The Carvel dealer is selling ice cream in a specially designed building bearing large "Carvel" signs, using Carvel equipment with the Carvel name on it, and is thereby representing to the public that Carvel ice cream is being sold. The public has a right to expect ice cream sold under the Carvel name to be of a uniform quality and Carvel's agreement with its suppliers reflects its efforts to maintain that quality. It is obviously necessary for the protection of the good will that Carvel has developed that a uniform Carvel Mix, prepared according to the Carvel secret formula, be used by the Carvel dealers, rather than different mixes of varying standards and quality.

Carvel's concern with the quality of the product to be sold under its trade name is apparent from the Rakestraw-Carvel agreement of May 14, 1956 (Pl. Ex. 15; R. 337, 16). That agreement provides that "only materials of the highest quality shall be used" (R. 339); that "Carvel Mix shall be packed in sanitary ten (10) gallon cans, free and clean of any rust spots" (R. 340); that "employees of Carvel shall have the right (but not the obligation), at any and all reasonable business hours of the day, to enter and inspect the plant of the Processor [Rakestraw] manufacturing Carvel Mix and the distributing depots of the Processor, if any, and shall also have the right (but not the obligation) to inspect all materials, machines and equipment used in conjunction with manufacture of Carvel Mix, wherever located" (R. 344); that "Carvel may return any Carvel Mix delivered in unsanitary cans or any mix that, in its reasonable opinion of authorized personnel, does not conform to the formula for Carvel Mix herein referred to, or in the manufacture of which materials of inferior quality have been used. Carvel may refuse to accept further deliveries until the Processor has demonstrated to Carvel that it has taken appropriate action to prevent the reoccurrence of any such deficiency" (R. 345).

It has never been contended that Rakestraw occupied a monopoly position in the manufacture of ice cream, and the reasonable economic basis for a refusal to sell directly to Carvel dealers is readily apparent. Hence petitioners have failed to meet either of the tests of *per se* Sherman Act violation established in the cases of *United States* v. *Bausch & Lomb Optical Co.*, 45 F. Supp. 387 (S. D. N. Y. 1942), *aff'd by an equally divided Court*, 321 U. S. 707 (1944), and *Bascom Launder Corp.* v. *Telecoin Corp.*, 204 F. 2d 331 (2d Cir.), *cert. denied*, 345 U. S. 994 (1953).

CONCLUSION

Respondent Rakestraw's Dairy Products, Inc., respectfully submits that the judgments of the Court of Appeals for the Second Circuit affirming judgments dismissing the complaints against Rakestraw's Dairy Products, Inc., were correct in all respects, and should be affirmed.

Dated: New York, New York.
February 16, 1965

Respectfully submitted,

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CARVEL CORPORATION, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR RESPONDENT, EAGLE CONE CORPORATION.

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR RESPONDENT, EAGLE CONE CORPORATION.

Statement.

The petitioners were plaintiffs in nine antitrust suits brought in the United States District Court for the Southern District of New York, wherein they sought treble damages against Carvel-defendants and supplier-defendants. Eagle Cone Corporation, one of the supplier-defendants, was named a defendant in six of said actions. Eagle sold to Carvel its total requirements of ice cream cones in the tri-state area of New York, Connecticut and Massachusetts. The complaint named Eagle as one of the conspir-

ators in the alleged violation of the antitrust laws. The District Court dismissed the complaint as against the supplier-defendants (206 F. Supp. 626). The Court of Appeals for the Second Circuit affirmed such dismissal. The dissenting opinion of Judge Lumbard was addressed only to the tie-in phase of the franchise agreement. The Court of Appeals was unanimous in its affirmance of the dismissal as against the supplier-defendants.

Parties to the Law Suit.

During the course of the litigation, the plaintiffs discontinued their action as against a number of supplier-defendants. The actions against Burry Biscuit Corporation, Illinois Baking Corporation and Richardson Corporation were discontinued by stipulation. The first of the two said named defendants obviously manufactured baked goods for Carvel in the same manner as did Eagle. The appeal was discontinued as against Mohawk Container Company, Inc., a supplier of paper goods (R. 4-5).

The alleged reason for the dismissal as against Burry Biscuit Corporation will be discussed in this brief. The reason for dismissal as against the other said supplier-defendants is not known. The petitioners in their brief have discussed at length the illegality of the franchise system, particularly as it referred to the requirement that the dealers use paper products from designated sources. (Pet. Brief, pp. 21, 24, 36, 37, 64, 65). Accordingly, the petitioners should have provided a reason for having dropped Mohawk from the case.

The Carvel-Eagle Supply Contract.

On or about May 1, 1955, Eagle entered into two sales contracts: one with Carvel Dari-Freeze Stores, Inc. (R. 124), and the other with Carvel Stores of New York, Inc. (Ex. 11, R. 264). Said contracts are virtually identical and provide the following:

1. Eagle agreed to manufacture and sell to Carvel all of Carvel's requirements of the cones described in said contract to be furnished to all Carvel stores in New York, Connecticut and Massachusetts (R. 125).

2. Eagle agreed to furnish the cones in the shape and design indicated on the attached drawing and to produce cones of said design only for Carvel and no other person (R. 125-126).

3. Eagle agreed to make delivery at its own cost to designated Carvel stores in accordance with instructions from Carvel in cartons imprinted with Carvel's name or trade mark (R. 126).

4. Eagle agreed to print Carvel invoice forms and to prepare invoices thereon addressed to the Carvel dealers; and to deliver same with each delivery of cones. Said invoices were to set forth the prices which Carvel charged to the Carvel dealers, namely: Small Type Cone—$4.95 per. thousand; Large Type Cone—$10.00 per thousand (R. 127).

5. Carvel agreed to pay Eagle $4.70 per thousand for the small type cone and $9.50 per thousand for the large type cone (R. 128). Payment was to be made by Carvel for the cones as delivered, on the first day of each month upon statement rendered (R. 129).

6. Carvel authorized Eagle to accept orders placed by any of the Carvel stores (R. 129).

7. The term of the agreement was for one year, and then to automatically continue from year to year

unless either party gave 90-day notice of intent to terminate (R. 129).

The two cones described in said contract were indicated on drawings attached thereto, namely Buddy Twinkle (R. 131) and Major (R. 133). The Buddy Twinkle went out of use shortly after the contract was signed and was replaced by the "No. 40 cake cup cone", which was sold to Carvel at $4.56 per 600 and listed in the invoices delivered with each shipment at $4.80 per 600 (R. 115-116). A photograph of the "No. 40 cake cup cone" appears on the reverse side of the Eagle price list (R. 383).

The Issue Discussed in this Brief.

Eagle will not undertake to argue the legality of the Carvel franchise operation, except to point out that in three recent decisions the courts again recognized the function served by such business method in the total economy, and the advantageous use thereof by small business in its competition with big business (*Crawford Transport Company* v. *Chrysler Corporation,* (6th Circ.), 338 F. 2d 934; *U. S.* v. *Arnold, Schwinn & Co.,* (N. D. Illinois) 5 C. C. H. Trade Regulation Reporter 71329; *Brown Shoe Company, Inc.* v. *F. T. C.* (8th Cir.) 5 C. C. H. Trade Regulation Reporter 71312.

In the instant case, Judge Dawson viewed the franchise system as good for the economy because "it creates a class of independent businessmen; it provides the public with an opportunity to get a uniform product at numerous points of sale from small independent contractors, rather than from employees of a vast chain." (R. 49). The Court of Appeals, in the majority decision, viewed the Carvel trademark as one "whose growing repute was

intended to help the little band of Carvel dealers swim a bit faster than their numerous rivals up the highly competitive stream." (R. 452). The majority then made a finding of fact which should be determinative of the allegation of an illegal tie-in, as follows (R. 452):

> "There may, of course, be cases where a trademark has acquired such prominence that the coupling of some further item to its license would constitute a *per se* violation; but such a trade-mark would satisfy the market dominance test of Times Picayune and Northern Pacific. The figures show that Carvel is not such a mark."

Eagle will address itself to Question "4" of the questions presented by the petitioners (Pet. Brief, p. 3) namely: "Whether the agreements between Carvel and the supplier-respondents, whereby the latter are obliged to refrain from dealing with or selling to petitioners, violate the Sherman Act."

Eagle's position is that it did no more than sell to Carvel its requirements of ice cream cones. It did not conspire with Carvel, or with the other suppliers, to boycott the Carvel dealers, or to refuse to make direct sales to them of either the cones designated by Carvel or of any other Eagle product.

In this case, Eagle was not the distributor in the typical vertical alignment of distributor to dealers. It was a manufacturer who supplied Carvel, the distributor. Petitioners have alleged illegality in the supply contracts "whether considered as reflecting a horizontal understanding among distributors or a vertical one between manufacturer and distributor" (Pet. Brief, p. 53). Such classification of the parties by the petitioners can only confuse the basic picture.

The role played by Eagle will be better appreciated by reference to three decisions. In *Bascom Launder Corp.* v. *Telecoin Corp.* (2nd Circ.), 204 F. 2d 331, Cert. Den. 345 U. S. 994, Telecoin developed a franchise system in which it supplied Bendix washing machines to its dealers who operated laundry stores. Telecoin was the distributor; and Bendix, like Eagle, was the manufacturer who supplied the distributor. The Court of Appeals found no illegality in the Bendix-Telecoin supply contract.

In *U. S.* v. *Bausch & Lomb Optical Co.*, 45 F. S. 387, aff'd 321 U. S. 707, Soft-Lite Lens Co. Inc. developed a franchise system in which it sold pink lenses to numerous wholesalers. Bausch & Lomb entered into an agreement with Soft-Lite in which it undertook to manufacture the pink glass, to grind the lenses, and to refrain from competing with Soft-Lite in their sale. The Court found no illegality in such contract between manufacturer (Bausch & Lomb) and distributor (Soft-Lite).

An analagous situation appears in the recent case of *Crawford Transport Company* v. *Chrysler Corporation* (6th Circ.), 338 F. 2d 934. There Chrysler, as distributor, required its franchised dealers to utilize the services of carriers retained by Chrysler to transport new vehicles to the dealers. The Court found no conspiracy between Chrysler and the retained carriers.

In said decisions, as in the present case, the courts scrutinized the contractual relationship between supplier and distributor as a factor separate from the distribution system itself. In the instant case the petitioners joined the suppliers as co-conspirators and accused them of aiding and abetting Carvel in an unlawful franchise operation (Pet. Brief, p. 63); of participating in an "entente" among themselves to boycott the dealers (p. 51); and of combining

with Carvel to deprive the dealers of their freedom to buy in an open competitive market (p. 52). They contended that such illegal conduct by the suppliers was established *per se* by the very contracts they made with Carvel. In reliance upon the *per se* doctrine they failed to offer any proof as to the volume of commerce in the relevant market area, or the probable effect thereon of the Carvel supply contracts. Yet the authorities require such proof in judging the validity of a requirements contract. In reliance upon the alleged *per se* invalidity of the supply contracts, the petitioners failed to offer any proof of overt acts to sustain a conspiracy as between Carvel and the suppliers.

We shall undertake to demonstrate that the courts below committed no error in dismissing the case as against Eagle, first because there was a total failure of proof to sustain the allegation of a conspiracy to boycott; and second, because the Carvel-Eagle contract meets the test of reasonableness as a requirements contract.

POINT I.

The petitioners have failed to show that any of the findings of fact made by the courts below in respect of Eagle are "clearly erroneous".

In *United States* v. *United States Gypsum Co.*, 333 U. S. 364, 394, the Court stated:

> "In so far as this finding and others to which we shall refer are inferences drawn from documents or undisputed facts, heretofore described or set out, Rule 52(a) of the Rules of Civil Procedure is applicable. That rule prescribes that findings of fact in actions tried without a jury 'shall not be set aside unless clearly erroneous' . . ."

* * * * * *

> "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed" (p. 395).

The appellants have the burden of demonstrating that erroneous legal tests were applied to essential findings, or that the findings themselves were clearly erroneous. It is not the function of the reviewing court to try the facts of the case *de novo.* The Supreme Court has stated that in antitrust cases the scope of review with respect to issues of fact is quite narrow (*Besser Mfg. Co.* v. *United States,* 343 U. S. 444, 446; *United States* v. *Oregon Medical Society,* 343 U. S. 326; *United States* v. *E. I. du Pont de Nemours & Co.,* 351 U. S. 377, 381). *In Crawford Transport Company* v. *Chrysler Corporation* (6th Circ.) 338 F. 2d 934, the Court stated (p. 940):

> "The evidence supports these findings of fact. Neither the findings of basic facts nor the inference drawn therefrom are clearly erroneous. This Court is bound to accept the factual inferences drawn by a trial judge from undisputed facts, unless they are clearly erroneous. Commissioner of Internal Revenue *v.* Duberstein, 363 U. S. 278, 291, 80 S. Ct. 1190, 4 L. Ed. 2d 1218; United States *v.* United States Gypsum Co., 333 U. S. 364, 395, 68 S. Ct. 525, 92 L. Ed. 746; Evans *v.* Commissioner, 330 F. 2d 518, 519, C. A. 6; In re Plonta, 311 F. 2d 47, C. A. 6".

At the outset of our argument, we submit that there has been no showing by the appellants to justify a reversal of any of the findings made by the courts below. As stated in *United States* v. *Yellow Cab Co.,* 338 U. S. 338, 340-341:

> "The judgment below is supported by an opinion, prepared with obvious care, which analyzes the evi-

> dence and shows the reason for the findings. To us it appears to represent the considered judgment of an able trial judge, after patient hearing, that the Government's evidence fell short of its allegations • • •"

POINT II.

Analysis of the Carvel-Eagle contract sustains the decisions of the courts below that Eagle was not part of a conspiracy to boycott the Carvel dealers or to unreasonably restrain competition.

Carvel's relationship with the dealers is one issue of the case; Carvel's relationship with the suppliers is a second issue, separate and distinct. The two issues must be considered separately, not joined together. In the course of the trial, Judge Dawson stated (R. 109):

> "I'm not interested in your suit against Carvel in the general picture. I'm interested in the fact that you're claiming damages against Eagle Cone and I want to know what Eagle Cone has done which should subject them to damages."

Observe that Judge Dawson's decision first analyzed the relationship between Carvel and the suppliers ("IV. Liability of the Supplier Defendants," R. 51-53). Having concluded that there was no illegal conduct on the part of the supplier defendants, Judge Dawson then proceeded to analyze the relationship between Carvel and the dealers pursuant to the franchise agreement, and to give his consideration to the tie-in and exclusive dealing aspects thereof. The Court of Appeals gave virtually its entire consideration to the Carvel-dealer relationship and considered "The Supplier Contracts" as a separate issue in the final section of the Majority Opinion (R. 449). The determination of

legality as to the suppliers was unanimous; Judge Lumbard dissented only as to the tie-in feature of the franchise agreement.

The Petitioners' Brief has consciously joined the two issues, thereby producing confusion rather than clarity. Thus, in Petitioners' Point II which is addressed to the franchise system, they bring into the picture the extraneous issue of the all-requirements provisions in the Carvel supplier contracts (Petitioners' Brief, p. 30). In the same Point they also state: "It is also clear that Carvel, *as the supplier of such goods,* is competing with other suppliers" (pp. 33-34).

By such interweaving of the two separate issues, the appellants have drawn a number of unsupported inferences, as follows (Petitioners' Brief, p. 51):

> a) Carvel enjoys a monopoly not only by virtue of the franchise agreements, but as a result of the "concert of action of the suppliers".
>
> b) Between Carvel and the suppliers "there was either agreement or at least acquiescence in a program of concerted action".
>
> c) The Carvel "supplier entente constitutes a combination and conspiracy to boycott".

Petitioners then attempt to bolster up their unsupported conclusions of illegality by coupling them with inapposite decisions in which the Courts struck down illegal horizontal combinations whereby competing suppliers actually ganged up to deprive a retailer of a source of supply (Petitioners' Brief, p. 52). They have cited *Kiefer-Stewart Co.* v. *Joseph E. Seagram & Sons, Inc.*, 340 U. S. 211, 71 S. Ct. 259, a case where competing manufacturers of liquor refused to sell to wholesalers. This Court held (p. 214):

> "Seagram and Calvert acting individually perhaps might have refused to deal with petitioner or with any and all of the Indiana wholesalers. But the Sherman Act makes it an offense for respondents to agree among themselves to stop selling to particular customers."

Petitioners have also cited *Standard Oil Company of California* v. *Moore,* 251 F. 2d 188, 211 (9 Circ.), Cert. Den. 356 U. S. 975, 78 S. Ct. 1139. In said case all the gasoline distributors in the area were charged with refusing to sell to a particular dealer, thereby forcing him out of business. In *Klors, Inc.* v. *Broadway Hale Stores, Inc.,* 359 U. S. 207, 79 S. Ct. 705, a similar boycott by competing suppliers of electrical appliances was conducted against a retailer who sold at discount. The Court stated (359 U. S. at p. 212):

> "Group boycotts, or concerted refusals by traders to deal with other traders, have long been held to be in the forbidden category. * * *
>
> "This is not a case of a single trader refusing to deal with another (citing cases); nor even a manufacturer and a dealer agreeing to an exclusive distributorship. Alleged in this complaint is a wide combination consisting of manufacturers, distributors and a retailer. This combination takes from Klors its freedom to buy appliances in an open competitive market and drives it out of business as a dealer in the defendants' products."

Despite the Petitioner's efforts to involve the supplier defendants as co-conspirators, the Court of Appeals was able to find in the Carvel-supplier contracts no evidence of an illegal boycott. Thus, (R. 449):

> "Carvel cannot be considered in competition with these suppliers from whom it purchases Carvel supplies, and such an agreement not to deal, even if

established, when effected by non-competing enterprises is not illegal. See, e.g., *Packard Motor Car Co.* v. *Webster Motor Car Co.*, 243 F. 2d 418 (D. C. Cir.), cert. denied, 355 U. S. 822 (1957). Moreover, the plaintiffs failed to prove that they were foreclosed from alternate sources of supply or indeed that the supplier defendants themselves had been requested to make sales to the dealers and had refused."

The District Court also held as follows (R. 51):

"The plaintiffs do not contend that the supplier defendants engaged in any common conspiracy with Carvel and with each other in furtherance of any illegal end. No evidence of any such conspiracy was offered; the plaintiffs relied on the agreements between Carvel and the supplier defendants to establish the unlawful conspiracies."

Upon examining said supplier contracts, the Trial Court held them legal as requirements contracts under the authority of *Tampa Electric Co.* v. *Nashville Coal Co.*, 365 U. S. 320 (1960); *United States* v. *Columbia Steel*, 334 U. S. 495 (1948); and *Bascom Launder Corp.* v. *Telecoin Corp.*, 204 F. 2d 331 (2nd Circ.), Cert. Den. 345 U. S. 994 (1953). It found further, as did the Court of Appeals, that the plaintiffs failed to prove that any of the supplier defendants were asked to make sales of unapproved merchandise and that they refused to do so. In respect of the allegation of a boycott not to sell, the District Court held (R. 53):

"Thirdly, even if the supplier defendants agreed with Carvel not to sell other than Carvel approved products to the franchise operators, such an agreement by two persons not in competition with each other would not have constituted an illegal boycott. Packard Motor Car Co. *v.* Webster Motor Car Co.,

243 F. 2d 418 (D. C. Cir.), Cert. Den. 355 U. S. 822 (1957); Schwing Motor Car Co. *v.* Hudson Sales Corp., 138 F. S. 899 (D. Md.) aff'd per curiam, 239 F. 2d 176 (4th Cir. 1956), Cert. Den., 355 U. S. 823 (1957)."

"Finally, the plaintiffs made no showing that they could not obtain non-Carvel merchandise from other suppliers or that the refusal of the supplier defendants to sell them such merchandise deprived the plaintiffs of any access to these goods."

As to Petitioners' Contentions of Illegality in the Carvel-Eagle Contract:

Despite the unanimous factual findings against them, the Petitioners still maintain in this Court that the Carvel-Eagle contract evidenced a participation by Eagle in an alleged conspiracy. The identical agreements which are now set forth in Petitioner's Brief were urged upon Judge Dawson, both in the course of Eagle's motion to dismiss the Complaint and in the final summation (R. 106-112). By referring to said arguments, this Court will appreciate the painstaking efforts made by the trial judge to scrutinize the Carvel-Eagle contract for possible illegality.

At page 47 of their Brief, Petitioners analyze the Carvel-Eagle contract. The Court should first observe two obvious, if not deliberate, distortions of fact. In the final paragraph of page 47, it is stated that it was the supplier's obligation to *collect* from each store. Such misstatement is repeated at page 16. Yet in paragraph numbered "8" on page 47, the Petitioners acknowledge that Eagle's obligation was only to bill the dealers on Carvel invoice forms, and not to make the collection thereof (See Contract, R. 127).

A second distortion appears in paragraph numbered "8" at page 47. Petitioners there state that the contract required Eagle to bill the dealers at prices *agreed upon* by

Carvel and Eagle. But at page 5, the Petitioners acknowledge that the prices to dealers were "determined by Carvel". The contract itself provides: "The invoices shall list the quantities of cones shipped and the following prices which Carvel charges to the Carvel dealers" (R. 127). The gravity of this distortion is appreciated when we observe that the plaintiffs attempted at the trial to utilize such false allegation that Eagle billed the dealers at prices "agreed upon" by Carvel and Eagle, as evidence of price-fixing. Judge Dawson summarily rejected such contention (R. 111).

The Petitioners have set before the Court five provisions of the Carvel-Eagle contract which they contend obligated Eagle to refrain from dealing with the plaintiffs (Pet. Brief, p. 47). Clearly, the provisions of the contract do not so restrict Eagle. In presenting said argument before Judge Dawson, the plaintiffs pointed specifically to Paragraphs 1 and 4 of the Agreement, namely, that Eagle would sell to Carvel all of Carvel's requirements of cones, and would produce cones of special design for Carvel and for no other person. Judge Dawson failed to find any violation of the anti-trust laws in such provisions (R. 110).

Thereupon, the plaintiffs abandoned the argument that a special design of cone was required by the contract, and endeavored to show instead that the cone with the swirl did not have the name of Carvel printed thereon, but bore the name "Major". Moreover, the Buddy Twinkle called for by the contract was soon discontinued; and the parties substituted therefor the "No. 40 cake cup cone", a standard Eagle product which it sells to the trade generally (R. 110-111, Pet. Brief, pp. 49-50).

Petitioners' argument in connection with the design of the cone is one of the most curious in their entire tortured presentation. First, it is apparent that they say nothing about the quality of Eagle's cone or about Eagle's ability

to produce and deliver expeditiously the quantities required in a highly competitive industry. They contend only that the design is not one peculiarly associated with Carvel, thereby raising a doubt as to Carvel's claim of uniqueness (Pet. Brief, p. 50). The Brief fails to disclose an important fact which was revealed to Judge Dawson, namely, that the plaintiffs discontinued their action as against Burry Biscuit Company, another supplier defendant, for the reason that the Burry product actually had the Carvel name stamped on its product and thus came within the Carvel trademark (R. 110).

Such argument is utterly specious and throws grave doubt upon the bona fides of the petitioners' claims. The argument appears to be that Eagle would not be in violation if only its cone had Carvel's name stamped on it. Petitioners' argument as to lack of uniqueness in the design of the Eagle cone becomes more incredible when considered in light of the decision in *U. S.* v. *Bausch & Lomb Optical Co.*, 45 F. S. 387, aff'd 321 U. S. 707. There the distributor was Soft-Lite Lens Co., Inc. which distributed pink lenses to licensed wholesalers. The function of Bausch & Lomb was similar to that of Eagle in the instant case; Bausch & Lomb manufactured the pink glass and ground the lenses which it sold exclusively to Soft-Lite. Unlike the instant case, Bausch & Lomb specifically agreed not to compete with Soft-Lite in the distribution of pink tinted lenses. The Court held that such contract effected a reasonable restraint upon competition. The Court stated (45 F. Supp. at page 399):

> "Nothing in the evidence indicates that Bausch & Lomb enjoyed a monopoly in the manufacture of glass for lenses, whether pink or otherwise. On the contrary, the evidence is clear that other manufacturers of lenses have had access to pink glass from other sources. . . ."

In *Bausch & Lomb*, the Government stressed the fact that the manufacturer who supplied the distributor (Soft-Lite) participated in an unlawful distribution system because it refused to sell pink lenses to any other customer. In the instant case, the plaintiffs claim a violation for precisely the opposite reason, namely that Eagle sold similar or equivalent cones to customers other than Carvel. Burry Biscuit, on the other hand, who made a product uniquely stamped "Carvel", which of necessity it could not sell to any other customer, was dropped as a party defendant because in the plaintiffs' eyes, the name Carvel printed on the product made Burry's arrangement with Carvel perfectly legal. The Court should give little consideration to this type of disingenuous argument.

In their argument before Judge Dawson, the plaintiffs virtually admitted that the Carvel-Eagle contract, standing by itself, contained no provision which restricted Eagle from selling direct to the dealers (R. 108). They then attempted to bring into the record certain testimony given by Mr. Vettel in a deposition taken in a case in which Eagle was not even a party (R. 108). The trial judge had specifically ruled that such testimony was not binding on the supplier-defendants (R. 106). Such improper reference to the testimony of Vettel has now been indulged in before this Court (Pet. Brief, p. 50). We are confident that the Court will disregard testimony which the trial court ruled inadmissible.

The petitioners' final effort to implicate Eagle as part of a conspiracy to refrain from selling direct to the Carvel dealers was its argument that the Court must *infer* knowledge on Eagle's part of the restrictive provisions of the franchise agreement (Pet. Brief, pp. 47-49; R. 108-109; 111-112). Judge Dawson was unable to find anything in the Carvel-Eagle contract which forced Eagle to comply with

the provisions of the franchise agreement (R. 111-112). The colloquy reads as follows (R. 108-109):

> "The Court: Where is there any statement that they won't sell those to a franchise operator?
>
> Mr. Yarnell: An agreement between Eagle Cone and Carvel contemplates the fact that the Carvel operators are under agreement with Carvel whereby they will not purchase or be permitted to purchase any cones other than those which are approved by Carvel and to Carvel specifications.
>
> The Court: Where does Eagle Cone agree to comply with any such thing?"

The trial court declined to draw an inference that Eagle entered into the contract with Carvel with full knowledge of, and in contemplation of Carvel's franchise agreements. Judge Dawson stated (R. 112):

> "The Court: I can't draw that inference unless there is proof. There is no proof. There is proof that Eagle Cone manufactures cones; that Carvel went to them and said, 'We will give you a design. You make the cones for us and we'll buy them at this price and you supply them to our stores.' That is the extent of the evidence in the case as far as Eagle Cone is concerned."

The Proper Inferences To Be Drawn From Martin Cain's Affidavit:

In a further attempt to prove knowledge by Eagle of the restrictive provisions of the Carvel franchise agreement, the plaintiffs referred Judge Dawson to the affidavit filed by Eagle's Sales Manager, Martin Cain. Judge Dawson then stated (R. 112):

> "I can't see anything in these paragraphs that shows any liability on Eagle Cone for what Carvel may have done with its franchised dealers."

Martin Cain's affidavit (R. 113-124) was prepared to show, *inter alia,* that the Carvel-Eagle contract was actuated by legitimate business motives and had a reasonable economic basis. In said affidavit Eagle presented facts which answered the question of whether its requirements contract with Carvel "springs from business requirements or purpose to monopolize" (*U. S.* v. *Columbia Steel,* 334 U. S. 495, 527). As stated in *Bascom Launder Corp.* v. *Telecoin Corp.,* 204 F. 2d 331, 335 (2nd Cir.), Cert. Den. 345 U. S. 994 (1953):

> "The plaintiffs could win only if they proved (1) that Bendix (the manufacturer) had a monopoly in fact of the product it sold to Telecoin (the distributor) and/or (2) the exclusive arrangement, as carried out, was without a reasonable economic basis and merely served as an instrument for unduly restraining trade."

In *Dennison Mattress Factory* v. *Spring-Air Co.* (5th Cir.) 308 F. 2d 403, 408, the Court said:

> "However, the cases seem to follow the principle that if the primary purpose of the contract is lawful, e.g., to protect one in the fruits of his labor, and if the arrangement was actuated by or could be explained on the basis of legitimate business justification as opposed to the desire to increase market control through economic leverage, then the court will generally hold any incidental restraint of trade, not harmful to competition or to the public, to be lawful. Dehydrating Process Co. *v.* Smith, (1 Circ.) 292 F. 2d 653."

The petitioners have gone through Mr. Cain's affidavit in an effort to show knowledge by Eagle of the restrictive provisions of the franchise agreement. (Pet. Brief, pp. 48, 50). We are confident that this Court will agree with

Judge Dawson that Mr. Cain's statements do not impute to Eagle any responsibility for what Carvel may have done with its franchised dealers.

Mr. Cain stated (par. 13, R. 116) that "The contract was negotiated by your deponent and Carvel officials in some five separate sessions over a substantial period of time." From such statement, the petitioners would have this Court speculate that Eagle must have then learned the restrictive provisions of the franchise (Pet. Brief, p. 48). But Mr. Cain stated in the self-same paragraph (R. 116-117):

> "I specifically deny that there were any understandings extrinsic to the contract relating to any restraint allegedly imposed on Carvel dealers such as preventing them from obtaining their cone supplies elsewhere, to deal directly with Eagle, to compel them to obtain their cones through Carvel, or to create artificial price levels at which they bought their cones. In short, Eagle had nothing to do with the dealers except to deliver cones to them per its agreement with Carvel."

In paragraph 9 of his affidavit (R. 115), Mr. Cain summarized the economic advantages accruing to both parties through the Carvel-Eagle contract as follows:

> (a) Carvel purchases from a supplier who has the productive capacity to supply its stores during periods of peak demand.
>
> (b) In the event of a labor dispute or act of God, Eagle could resort to its affiliated cone manufacturers in the East to make the special Carvel cones.
>
> (c) Eagle could supply all the Carvel locations with its own fleet of trucks.
>
> (d) Carvel knew that it would be obtaining cones made of high quality ingredients to assure public acceptance of their taste and flavor.

(e) The contract assured Eagle of a stable market in a fiercely competitive industry where orders are given on "as needed" basis.

(f) The Carvel-Eagle requirement contract is unique in the industry and very few of Eagle's 15 major competitors serving the tri-state area have them.

(g) Eagle could anticipate Carvel's requirements so as to have in stock adequate supplies of finished goods and raw materials to assure continued supply of cones to Carvel operators during periods of peak demand.

(h) Eagle's selling expenses were reduced.

Petitioners have focused their attention on Items (e) and (f) above (Pet. Brief, p. 48) and have inferred therefrom not only a complete awareness by Eagle of the restrictive provisions of the Carvel franchise but also "an admission of an express intent to join with Carvel in suppressing competition." (Pet. Brief, p. 49). They ask this Court to conclude, in the language of the *Bascom Launder* case (204 F. 2d, at page 335): "that the exclusive arrangement, as carried out, was without a reasonable economic basis and merely served as an instrument for unduly restraining trade".

In respect of Item (b) above, the petitioners have twisted Mr. Cain's statement that Eagle could resort to affiliated cone manufacturers who could make the *special Carvel cone,* to mean that the Eagle product could be produced without difficulty by any other supplier (Pet. Brief, p. 50). Mr. Cain was talking about "affiliated cone manufacturers"; he was not referring to the 15 competitive suppliers.

In paragraph 16 of his affidavit (R. 117-118), Mr. Cain listed 15 competitors of Eagle. In paragraph 22 (R. 120-121) he listed the number of cone machines operated by

each, showing that Eagle operates 9 machines of a total of 102; and that the three larger competitors operate 60 machines. The only inference that petitioners draw from such data is that the Carvel-Eagle contracts excluded Eagle's competitors from the market consisting of Carvel Stores (Pet. Brief, p. 50).

The inferences which the Court should properly draw from this data showing Eagle's relative position in the industry are that Eagle had no monopoly in fact of the product it sold to Carvel and that the Carvel-Eagle contract did not give it such monopoly. As stated in *Packard Motor Car Co.* v. *Webster Motor Car Co.*, (D. C. Circ.) 243 F. 2d 418, Cert. Den., 355 U. S. 822 (at page 420):

> "When an exclusive dealership is not part and parcel of a scheme to monopolize and effective competition exists at both the seller and the buyer levels, the arrangement has invariably been upheld as a reasonable restraint of trade.. In short, the rule was virtually one of per se legality."

And at page 421:

> "The short of it is that a relatively small manufacturer, competing with large manufacturers, thought it advantageous to retain its largest dealer in Baltimore, and could not do so without agreeing to drop its other Baltimore dealers. To penalize the small manufacturer for competing in this way not only fails to promote the policy of the antitrust laws but defeats it."

In the recent case of *Crawford Transport Company* v. *Chrysler Corporation* (6th Circ.) 338 F. 2d 934, Chrysler required its franchise dealers to utilize the transportation services of carriers which it retained to transport its new vehicles to the dealer. In the instant case, petitioners

contend that the Carvel-Eagle contract excluded competing cone manufacturers from the market consisting of Carvel stores (Pet. Brief, p. 60). In the *Chrysler* case it was similarly contended that Chrysler and the retained carriers entered into a conspiracy to eliminate competition; and to allocate to retention carriers, free from the competition of non-retention carriers, specified territories and percentages of business. The Court held that there was no evidence of any contract, combination or conspiracy in restraint of trade "or any attempt on the part of Chrysler, alone, to monopolize the business of transportation of new motor vehicles, or by combination with Commercial, Motors, or any of the other retention carriers to monopolize such business."

POINT III.

The Carvel-Eagle contract satisfied the test of reasonableness which this Court has imposed upon requirements contracts.

Once we eliminate from the case the unproved conspiracy, the Eagle-Carvel contract may be judged as a simple requirements contract. An analysis of its "economic ramifications" in the ice cream cone industry, or indeed even in the ice cream industry, will satisfy the test of reasonableness imposed by the decisions. The only inference which the evidence can sustain is that the effect of said contract in the relevant market area was infinitesimal.

Judge Dawson held (R. 52):

> "There is no allegation in the complaint that the provisions under which the dairies agreed to furnish all of Carvel's requirements for Carvel Mix were

> illegal in themselves, and the plaintiffs failed to prove that such provisions were in fact illegal. See, Tampa Electric Co. *v.* Nashville Coal Co., 365 U. S. 320 (1960); United States *v.* Columbia Steel, 334 U. S. 495 (1948)."
>
> * * * * * *
>
> "The same conclusion applies to the contracts of the two other supplier defendants, Eagle Cone Corporation and Mohawk Container Co. . . . These contracts were not shown to be in any way illegal, still less illegal *per se.* See Bascom Launder Corp. *v.* Telecoin Corp., 204 F. 2d 331 (2d Circ.), Cert. Denied, 345 U. S. 994 (1953)."

In an article by Stanley D. Robinson entitled "Restraints On Trade And The Orderly Marketing of Goods" (45 *Cornell Law Quarterly* 254, (1960); 2 *Hoffman's Antitrust Law and Techniques* 81), the author states:

> "Since Bausch & Lomb, exclusive selling has rarely come under governmental fire. In a later case, which involved an international cartel, the Department of Justice was unsuccessful in its attempt to enjoin one of the defendants from continuing exclusive distributing arrangements which had not been employed in furtherance of the conspiracy (United States *v.* Imperial Chemical Industries, Ltd., 105 F. S. 215, 244-45 (S. D. N. Y. 1952)). But by and large the attacks have come from private parties seeking treble damages. And, as we have seen, their efforts to induce the courts to depart from traditional doctrine have met with single failure. This is an area, then, where it can be said with some certainty that the antitrust laws do not stand in the way of a normal and reasonable restriction on competition. The rule of reason operates here in full sway."

In spite of the plaintiffs' failure to offer any proof as to the influence of the Carvel-Eagle contract upon the market, the record does contain a detailed analysis thereof made by Martin Cain (See Affidavit, R. 117-123).

Said affidavit showed that Eagle had 15 major competitors who supply customers in the tri-state area of New York, Connecticut and Massachusetts on the same basis as does Eagle (R. 117-118). Sales by all manufacturers in the tri-state area averaged 1,250,000,000 cones per year, Eagle sold Carvel 15,000,000 cones per year, or 7/10ths of 1% of the total sold by all manufacturers (R. 119). The dollar volume of sales by all manufacturers averaged $11,000,000 per year. The volume of sales by Eagle to Carvel was $115,000, or 1% of the total sold by all manufacturers (R. 119). The total volume of all Eagle sales in the area, including sales to Carvel, amounts to $500,000 or 5% of the total sold by all manufacturers (R. 123).

All manufacturers in the area operate a total of 106 to 110 ice cream cone machines; Eagle operates 9 of said machines (R. 120); 25 machines are operated by National Biscuit Company, which sell to 20% of the market; and 25 machines are operated by S & S Cones which also sells to 20% of the market. More than one-half of the total number of machines are operated by three companies other than Eagle (R. 120, 123).

In the area, there are 125,000 ice cream outlets where ice cream in cones may be purchased by the consuming public. Eagle delivers to 250 Carvel dealers, or to 1/5th of 1% of the total number of outlets. Among said outlets are "Dairy Queen", "Tastee Freez", "Dari-Delite", "King Kone", "Dari Isle" and other smaller chains, as well as thousands of independents. Also included are manufacturer-retailers like Woolworth; companies like "Good

Humor" and "Bungalow Bar", as well as independents, who operate trucks and carts; and the hard ice cream chain like Howard Johnson and Friendly Ice Cream Co. (R. 122).

The proof of the relevant market applicable to the sale of ice cream cones in the tri-state area consisted exclusively of the facts set forth in the Cain affidavit. The plaintiffs offered no proof to contradict a single fact recited therein. Indeed they offered Cain's affidavit as their own exhibit (R. 113). The conclusion is inescapable that no substantial competition was foreclosed in such market, particularly when the scope of Eagle's operations are considered in comparison with the much larger restraint in trade evidenced in the *Columbia Steel* case and the *Tampa Electric Co.* case, two instances where the Supreme Court upheld the validity of requirements contracts. It should also be noted that the duration of the requirements contract in the *Tampa Electric Co.* case was for 20 years, while in the case at bar, the term was for one year with automatic renewal, and with the privilege to terminate available to either party on 90 days' notice. The Courts have uniformly held that a one-year term for a requirement contract is reasonable (*F. T. C.* v. *Motion Picture Advertising Service*, 73 S. Ct. 361; *U. S.* v. *American Can Co.*, (D. C. Calif.), 87 F. Supp. 18, 31; *U. S.* v. *American Linde Air Products Co.*, (N. D. Ill.) 83 F. Supp. 978, 982).

The Court of Appeals considered the foregoing evidence and noted in its majority opinion that Carvel's purchases from Eagle amounted to only about 1% of the total sales of cones in the tri-state area (R. 451). Such figures satisfied the majority of the Court as to the "insubstantiality" of the commerce affected. Moreover (R. 451-452):

> "Not only was the amount of commerce in these not consequential, but any damage to the plaintiffs was

even less so. Eagle Cone's billings to Carvel averaged $460. per dealer per year, and Carvel's mark-up was slightly over 5% or about $25. per dealer; whether the dealers suffered even that much damage is questionable since the price Carvel charged them was less than they could have obtained, if they bought in smaller quantities than Carvel, see fn. 7 to Chief Judge Lumbard's opinion."

Conclusion.

It is respectfully submitted that the judgment dismissing the complaint as against Eagle Cone Corporation should be affirmed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1964

No. 355

BERNARD SUSSER, *et al.*,
Petitioners,

—against—

CARVEL CORPORATION, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE CARVEL RESPONDENTS

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IN THE

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No. 355

BERNARD SUSSER, *et al.*,

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—against—

CARVEL CORPORATION, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE CARVEL RESPONDENTS

Opinions in the Courts Below

Two opinions were delivered in the United States Court of Appeals for the Second Circuit which affirmed the judgments of the district court. They are reported at 332 F. 2d 505 and included in the record on this appeal, R. *431.*[1] Report of the opinion by the United States District Court for the Southern District of New York is at 206 F. Supp. 636. It is reprinted here, R. *43.* As set out in the official report, the opinion of the Court of Appeals, (*per* Friendly, Circuit Judge, with whom Medina, Circuit Judge, joins), 332 F. 2d 505, 518, R. *449,* appears after the opinion by Lumbard, Chief Judge (writing for the majority in part and dissenting in part), 332 F. 2d 505, 508, R. *431.*

[1] Italicized record references refer to the opinions below; throughout this brief all emphasis is ours unless otherwise noted.

Questions Presented

Introductory: the Terms and Circumstances of the Case

Thomas Carvel founded, and with his wife,[2] came to own the business of the several related and affiliated respondent Carvel corporations (collectively referred to herein as "Carvel"). Carvel is in the business of arranging for the manufacture and sale of Carvel ice cream products, made from Carvel special formula ingredients, through franchised outlets. Each franchisee agrees that he will devote his best efforts to operate his Carvel franchise. Carvel, in turn, gives the franchisee a specified geographic territory in which he is granted the exclusive right to manufacture and sell Carvel ice cream products, under the Carvel trademarks. The franchisee must make his Carvel ice cream products from special formula Carvel ingredients. Carvel also makes available to the franchised dealers equipment and auxiliary products such as paper goods, which the dealer may need in his business and which he may buy from Carvel, or from any other source selling equivalent merchandise. Carvel has no customers other than its franchised dealers.

Carvel abandoned a pre-1955 franchise agreement and entered into a new form of franchise agreement with petitioners, obligating them to buy from Carvel or from ap-

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[2] Appellants consented to the dismissal of appeals from the judgments of the district court dismissing in their entirety the claims against Thomas Carvel, his wife, Agnes Carvel, and other individuals identified with the Carvel business (R. 429).

"The actions as against these individuals . . . were dismissed by the Court on motion at the end of the case on the ground that no basis for any individual liability had been shown by the plaintiffs' evidence" (R. 46, fn. 3).

proved sources designated by Carvel, their entire requirements of only those supplies which are a part of the ice cream end products sold to the public under Carvel trademarks and tradenames. The new agreement permits the dealer to purchase machinery, equipment, and paper goods from independent sources as long as his store is maintained in accordance with Manual specifications (R. *434*), and to sell Carvel products "at any price that the dealer determines" (R. *435*).[3]

The Questions Presented

1. Whether the record shows clear error on the part of both courts below which found and decided that: (a) the Carvel agreements were motivated by lawful purpose and not for predatory, monopolistic or other illicit purposes, (b) there was insufficient proof that Carvel's system of business was an unreasonable restraint of trade or that it accomplished or tended to bring about substantial foreclosure of or injury to competition, (c) there was insufficient proof that Carvel possessed sufficient economic power over a tying product to induce or compel its dealers to purchase tied products, (d) there was insufficient proof with respect to items, claimed to be tied products, that Carvel appreciably restrained free competition therein, affecting a not insubstantial amount of interstate commerce, and (e) the proof was sufficient to show legal and economic justification for the inclusion and enforcement of the restrictive contractual provisions of which petitioners complain.

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[3] The pre-1955 franchise agreement under which Carvel had the right to require the dealers to adhere to its prices is not involved on this appeal since the only plaintiffs in the trial below who entered into the pre-1955 franchise (i.e. the *Sussers*, the *McCoys*, the *Fredericks*, and *Mueller*) do not have appeals pending as to the Carvel defendants, see fn. 4, *infra*.

2. Whether the record shows clear error by the courts below which found and decided that Carvel did not engage in an unlawful price-fixing[4] scheme.

3. Whether the record shows clear error by the courts below which found and decided that the supply contracts between Carvel and the other respondents herein did not violate the antitrust laws.

Statement of the Case

Preliminary Statement

Petitioners have misinterpreted the factual basis of the decisions of the courts below. Their treatment of the facts is in many respects distorted, inaccurate and incomplete. Virtually ignoring the findings below, they seem to assume that grant of certiorari automatically entitles them to evaluation and findings of fact by this Court, de novo. Accordingly, it becomes necessary for us to present a counter-statement of the facts in some detail to show the genuine

---

[4] The finding by the district court that Carvel's pre-1955 franchise agreement contained an illegal price-fixing provision applied only to four of the twelve franchise dealers who were plaintiffs below, namely, Susser, McCoy, Frederick and Mueller (R. *66*); the district court did not enter final judgment as to any claim for relief against the Carvel respondents by these four dealers (R. *71*, 72-102) who are petitioners here, on appeal from judgments affirming dismissal by the district court of their respective claims against the non-Carvel corporate defendants (R. *71*, *72-73*, *77-79*, 89-90). Chief Judge Lumbard was mistaken in stating in his separate opinion that Carvel failed to appeal from a judgment based on the illegal price-fixing provisions of the pre-1955 franchise agreement (R. *435*), and that the district court directed "entry of judgments in all the actions" (R. *435*, fn. *2*), because there was no direction for the entry of judgments against the Carvel respondents in the cases brought by Susser, McCoy, Frederick and Mueller (R. *71*), and no such judgments were in fact entered (R. 72-102). Consequently, there was nothing from which Carvel respondents could appeal, and therefore the pre-1955 franchise agreement is not in issue on this appeal insofar as Carvel is concerned.

state of the record and the foundation for the findings, reasoning and decisions of the lower courts.

The proof of record consists of documents, stipulations and oral testimony which petitioners did not discredit, contradict or refute. While the evidence may in retrospect seem meagre on some aspects of the case, the district and appellate courts found it sufficient to justify dismissal of the complaints. Manifestly, the quantum of respondents' evidence was influenced by petitioners' voluntary stipulation to limit their evidence "to written agreements and other documents" and thereby establish *per se* violations of the antitrust laws (R. 5). Whatever view is taken of the effect of petitioners' stipulation to stand or fall on proving *per se* violations, no restriction was imposed on the offer and admission of their evidence which in the aggregate was found insufficient by the courts below to show any antitrust illegality, *per se* or otherwise. Nor is it open to fair challenge that Carvel and the other respondents were entitled to shape their defense in reliance on petitioners' self-limitation to prove *per se* offenses.

Perhaps petitioners' glaring departure from the realities of the record and findings of fact is best exemplified by their hyperbolic insistence that "the Carvel system is revealed as a vast interrelated scheme whose only purpose and effect is to restrain competition" (Their Brief, p. 19), "the dealer is no more than an economic serf," . . . "the Carvel octopus . . . strangled free enterprise with a frightening finality," having "no parallel in any recorded case" (*id.* 63), and "The decisions of the lower courts, have, in effect, emasculated and repealed the antitrust laws with respect to the owner of a trademark" (*id.* 68). This rhetorical

indictment typically ignores dismissal on the merits, after a protracted trial of petitioners' allegations of fraud (R. *46, 433, 455*)[5] and unanimous exoneration, after trial of the antitrust claims, from charges of predatory purpose (R. *62, 448, 452*). Petitioners without support in the record contradict the findings on the record by the district court that (R. *49*): "*The franchise system creates a class of independent businessmen;* it provides . . . a uniform product at numerous points of sale from small independent contractors, rather than from employees of a vast chain. *The franchise system of operation is therefore good for the economy*"; and concurrence by the Court of Appeals (R. *452*), that the growing repute of the Carvel trademark "*. . . was intended to help the little band of Carvel dealers swim a bit faster than their numerous rivals up the highly competitive stream.*"

Petitioners' Grievances

So far as concerns Carvel, this appeal relates only to eight petitioners, all of whom entered into the post-1955 franchise agreement (R. *54, 66*, fn. 6), involving four franchise stores in Pennsylvania and four in Connecticut.[5] The Pazdro complaint, which was the last to be filed (May 20, 1960), is submitted as typical (R. 137). It alleges that Carvel was engaged in the business of selling and distributing freezers and allied equipment and supplies to retailers who sold ice cream under the name of Carvel or Dari-Freeze, or both (¶ 10, R. 139). It is also alleged that Carvel, in order to secure a monopoly in the products which they

[5] Pennsylvania: Pazdro, Giberman, Pierce and Rodens; Connecticut: Modick, Ossola, Seu and Phelan (R. *54*, fn. 6).

manufacture: ". . . entered into . . . contracts and leases with plaintiffs . . . and sold to them merchandise, supplies and equipment, *on the express condition that the plaintiffs and others refrain from dealing in competitive products*" (¶ 58, R. 147). The complaint of the other petitioners of which this one is typical, contains substantially the same allegations (R. 3-10). All of them predicate their claim on the alleged unlawful nature and effect of total requirement and exclusive dealing agreements.

There is no claim by Paźdro or the others of an unlawful tying requirement. There is no charge that the sale of equipment, patented or unpatented, was conditioned upon the purchase or lease of other goods. Absent also, is any specific allegation that the licensed use of trademarks as such is conditioned upon compulsory purchase of other (tied) products. It is crystal clear that the gravamen of the complaint for violation of the antitrust law, in each petitioner's case, is predicated on price fixing, an alleged conspiracy to restrain trade and alleged unreasonableness of the total requirement and exclusive dealing features of the Carvel agreements with dealers. That the grievance of coercive tying provisions is not featured in petitioners' complaints, is most unusual. If the Carvel dealers had actually been made to feel that they were denied the ability to purchase a piece of equipment which they regarded as desirable, or to obtain use of desirable trademarks, unless they also agreed to buy articles which were less desirable, it is strange, indeed, that the complaints say nothing about the matter.

Petitioners submitted to the district court, through counsel who represented all of them, a voluminous particulariza-

tion of their antitrust claims entirely consistent with the *absence* of reliance on unlawful tying agreements.[6] In *singular* contrast to their strenuous advocacy here of every species of presumptive unlawfulness, we invite attention to the following which appears in the particularization of their claims as represented to the district court: As to Carvel's *patented* freezing equipment, they say:

> "The plaintiffs will establish, through the testimony of non-interested witnesses and former Carvel employees that Carvel does not own the patents on the freezing equipment but claimed to own them as an added inducement to effect the sale of the franchise." (Submission, p. 41)

> "It will also be established, through disinterested witnesses as well as former Carvel employees, that the freezer to which Carvel claims a patent was secured from the Morris Manufacturing Company *and that similar and better machines are available, at lower prices, on the open market.* The fact that Carvel does not own the patent on the freezer will be established beyond peradventure of doubt." (*id.*, p. 42)

Denigration of Carvel *trademarks* was couched in terms of their *non-existence*:

> "It is submitted that the claimed patents, trademarks and copyrights exist only in the mind of Thomas Carvel and are as real as his imagination. We concede, however, that Thomas Carvel, but none of the Carvel Corporate defendants, owns such 'valu-

[6] The submission made pursuant to a pre-trial order of January 10, 1961, devotes its first one hundred pages to a particularization of the fraud count and the antitrust counts in the complaints.

> able' trade-marks as 'Lollapalooza' under registered trademark dated September 10, 1957. . . ." (*id.*, p. 44)

Nor does it deserve to be overlooked that petitioners objected to the introduction in evidence in the antitrust trial of the Carvel trademarks (R. 153, 155). Additionally, counsel's submission confirms that petitioners were assuming the burden of proving illegal price maintenance and "conspiracy to boycott and foreclosure of competition" *without mentioning tying arrangements;* they said:

> "It will be conclusively established at the trial of this action, through the unimpeachable testimony of former employees of Carvel, that the Carvel organization entered into agreements and understandings with suppliers of merchandise *to give and grant kickbacks to the Carvel organization* and in addition thereto to sell merchanise to Carvel at fixed prices and to refrain from selling such merchandise to Carvel operators. *The purpose, design and intent being to foreclose competition based upon the franchise agreement between Carvel and its operators and to permit and allow Carvel to profit from its agreements with suppliers of merchandise*" (*supra*, pp. 84-85).

Only after the antitrust trial did petitioners for the first time argue that under the pre-1955 franchise agreement Carvel used the freezer and front assembly plate as the tying element to induce purchase of tie-in supplies, and claimed (notwithstanding specific provisions to the contrary), that the same practice was followed under the post-1955 franchise agreement (Plaintiffs' post-trial brief, pp. 17-20). The district court found these contentions without merit (R. *56-59*). The Court of Appeals sustained these

findings (R. *449-456*). Petitioners' briefs in both courts below did not so much as refer to the trademarks as an element in the alleged tying arrangement. This appeared for the first time in their petition to this Court for a writ of certiorari. Petitioners' claim of error by the courts below in failing to find the pre-requisite facts for unlawful tying agreements will be dealt with under a separate point in this brief (*infra,* Point I). Preliminarily here, it is not without significance that none of the complaints filed at different times between September 1959 and May 1960 (R. 3, 4) stated a claim based on illegal tying requirements, and that such charge generally, but more particularly with reference to the trademark as a "tying product", was an after-thought, *without* factual basis in the business relationship of the parties. These facts and circumstances seem especially meaningful in the context of far flung fraud charges, brought by a group of widely scattered dealers, represented in common by the same lawyer. Ultimately, after severance and separate trials, petitioners' claims that Carvel's franchise system was built on systematic fraudulent practices, were dismissed. This does not alter the obvious fact that the extravagant fraud claims were originally designed as a magnifying frame to build up the treble damage cases. These, in turn, which were not factually predicated on "proscribed" tying requirements, were recognized for their "triviality" and "negligible" character by the Court of Appeals which affirmed their dismissal (R. *455*).

Industry Background

The Carvel enterprise is part of the ice cream industry engaged in the sale of ice cream products. The district court noted that the method of distribution by means of

numerous franchised outlets "has had a phenomenal growth in the ice cream industry," that it enables many with small capital to become . . . "small independent contractors, rather than . . . employees of a vast chain" (R. *49*). Consumer acceptance of the variety of ice cream products distributed by numerous franchising organizations adopting a uniform style of doing business through "literally thousands of individual stores all over the country" is a post-war development, beginning about 1948.[7] The principal ingredient is ice cream *mix* which is as "old as the dairy business itself." The end product made from the ice cream mix is available to the public at a multitude of sources, from the corner drugstore to roadside stands and mobile units (R. *451*).[8]

Thomas Carvel, the founder of the Carvel business, entered the ice cream field in 1948 with a background of

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[7] This growth of the franchise system was pointed out in a decision not directly germane here, Ar-Tik Systems, Inc. v. Dairy Queen, Inc., 302 F. 2d 496 (3d Cir. 1962), where the Court said:

> "The suit is an incident in the phenomenal development of the merchandising of this frozen dessert or soft ice cream product to the public by literally thousands of individual stores all over the country under practically uniform methods within a period of less than 23 years" (*id.* at 500).

In a connected case, Ar-Tik Systems v. McCullough, 133 F. Supp. 807, 808 (S.D. Ill. 1955), it was noted that the general plan measuring compensation to the franchising organization by the gallonage of mix processed through a dispensing freezer had become "commonplace".

[8] In Engbrecht v. Dairy Queen Co., 203 F. Supp. 714, 720 (D. Kans. 1962), which in another connection will be subsequently discussed herein, the Court observed:

> "Here we are dealing with a commodity old as the dairy business itself—a soft-mix ice cream—available in almost every restaurant, inn, eating place, drug store and crossroad. It may be had in any degree of viscosity, in any flavor—vanilla, chocolate, strawberry, orange, lemon and lime. It may be commercially processed or privately prepared and frozen."

experience since 1934 with frozen custard products (R. *47-48*). He developed and patented a one piece barrel and dispenser tip for a freezer and obtained design patents and a number of trademarks serving to identify and promote recognition and sale of the ice cream products sold under the Carvel name (R. *442*, fn. 6-a). The related Carvel companies were authorized by the owner to use, and license others to use, the patented items and trademarks for the exclusive purpose of franchising dealers to make and sell the Carvel ice cream products. The number of Carvel stores grew rapidly from 180 in 1954 to 400 at the time of trial in 1962 and the Carvel gross volume of sales to these stores reached a high point of five and one-half million dollars in 1957 and aggregated under four and one-half million dollars in 1960. The annual gross volume of the franchised dealers themselves ranged from six to eight million dollars (R. *434*), by stipulated estimation (R. 29). The area of greatest concentration of the Carvel business was concededly in the five states of Massachusetts, Connecticut, New York, New Jersey and Pennsylvania, with a very few Carvel dealers located in four other states (R. 30, *451*).[9]

Carvel was, and is, in direct competition with numerous franchising organizations sponsoring competitive ice cream products such as "Dairy Queen, Tastee Freez, Dari Delite, King Kone, Dari Isle, and others, with chains and independents utilizing mobile units, with chain stores and operations such as Howard Johnson, and with the ubiquitous corner drugstore" (R. *451*, 122). The courts below found that Carvel was not in competition with the suppliers of

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[9] Facts bearing on Carvel's share of the market are discussed in the body of our argument, *infra*, Point IVA.

dairy and other products from whom it purchases Carvel supplies (R. *449, 442, 53*). It was found that at the supplier level, there was "vigorous" competition to secure business from Carvel (R. *443, 451, 452*).

The Carvel Franchise Agreements

The pre-1955 franchise agreement differed from the post-1955 franchise agreement in two major respects. First, the pre-1955 agreement provided that the franchisee would have to charge retail prices determined by Carvel (Pl. Ex. 2, R. 221, 227, 3150). Second, it required the franchisee to purchase all equipment from Carvel (*id.* 224). These provisions were abandoned in 1955. The rights of franchisees under the pre-1955 agreement were brought into conformity with the rights of those franchisees who entered into the post-1955 franchise by the letter of February 27, 1956 (Defs. Ex. C1-B, R. 283, 3514). By this means, Carvel made it clear that henceforth each franchisee was to have the right to set his own prices for Carvel products and any past references "to the retail prices . . . are deemed to be references to *recommended* prices only" and "you are entirely at liberty to vary these prices if you so desire, and we disclaim any intention to control your retail prices." It was made equally clear that equipment and those supplies not sold as part of the end product, as long as they are up to specifications, may be purchased anywhere, while "the mix (made according to our own Special Formula) as well as . . . all items which are sold as parts of the end product that is offered as Carvel's Frozen Dairy Product, in its various forms, to the retail purchaser who consumes it . . ." must be bought from Carvel ". . . because the public comes to your store to buy a 'CARVEL' product—

and it is a 'CARVEL' quality product that you sell in that fashion" (Def. Ex. C-1B, R. 283-284, 3514).[10]

The basic contract document on this appeal is the post-1955 "Dealer's Franchise Agreement" (Pl. Ex. 1, R. 208, 3148), which establishes the franchisee as the exclusive retail manufacturer and vendor of Carvel ice cream products in a specified area (Pl. Ex. 1, R. 208, 210, Par. "FIRST"; 213, Par. "TWELFTH", 3148). The franchise agreement is also a total requirements contract whereby Carvel agrees to sell to the franchisee and the franchisee agrees to purchase from Carvel or a Carvel approved supplier his entire requirements only of those Carvel supplies which are needed to make the Carvel ice cream products sold to the public (Pl. Ex. 1, R. 208, 211, Par. "SIXTH", 3148). Depending on his customers' preference, the dealer has a choice among 70 items of supply which go into the processing of the end product which he is required to buy from Carvel; here remain on Carvel's product sheet more than 400 other items which the dealer may buy wherever he chooses, if they are of equal specifications (Pl. Ex. 8-A, § H, supply lists No. 1 through 10, 3165).[11]

The franchisee is given the right to identify the final ice cream products made and sold by him as "Carvel" ice cream products, which in fact they are (Pl. Ex. 1, R. 208, 212, Par. "SEVENTH", 3148). The franchise agreement further provides that in return for Carvel instructing and training the franchisee with respect to Carvel's manufacturing and merchandising methods and techniques and for

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[10] Emphasis in the original.

[11] This exhibit is among those designated and brought to the Court pursuant to Rule 38; see R. 5 fn.

the use of the name "Carvel" the franchisee shall pay as compensation to Carvel 25¢ per liquid gallon of mix used (Pl. Ex. 1, R. 208, 212, Par. "SEVENTH", 3148). Thus the compensation that Carvel receives is dependent upon the success of each franchisee since Carvel's compensation rises as the franchisee prospers and in fact is a direct function of the business done by each franchisee.

The franchisee is clearly and unequivocally given the right under the franchise agreement to charge any price he wants for the Carvel products he makes and vends and it is further explicitly made clear that any price emanating from Carvel is merely a "recommended" price which the franchisee is completely free to disregard (Pl. Ex. 1, R. 208, 212, Par. "EIGHTH", 3148; R. *435, 436*). The franchisee is also specifically and unequivocally given the right to purchase all items other than "end product" ingredients (e.g. equipment, paper goods, etc.) from any source he desires, provided Carvel specifications are met (R. *434*). In the event the franchisee wishes to purchase paper goods from a source other than Carvel, Carvel agrees to permit manufacturers of such products to print the Carvel name on such goods (Pl. Ex. 1, R. 208, 212-213, Par. "NINTH", 3148).

Finally, under the franchise agreement each franchisee agrees that he "will devote his best efforts and his entire time" to the operation of his Carvel franchise (Pl. Ex. 1, R. 208, 213, Par. "ELEVENTH", 3148) and that he will sell only Carvel ice cream products made in accordance with the S.O.P. from his Carvel store (Pl. Ex. 1, R. 208, 211, Par. "FOURTH", 3148). The relevant provisions of the post-1955 franchise agreement are as follows:

> "FOURTH: During the term of this agreement, the Dealer agrees to sell at the Carvel Store, Carvel's

Frozen Dairy Product solely in accordance with the Manual and will sell no other product except as hereinafter expressly otherwise provided . . . "

"FIFTH: The parties recognize the necessity for operation in accordance with the standards set forth in the Manual and agree that Carvel inspectors and officers shall, for the protection of the Dealer, the public and Carvel, and its trade-marks and tradenames, make periodic inspections of the Carvel Store and of the operations . . . "

"SIXTH: In order to safeguard the integrity of Carvel's trade-marks, the Dealer agrees that he will purchase from Carvel or from approved sources designated by Carvel, his entire requirements of Carvel's Frozen Dairy Product mix, toppings, flavorings and other ingredients, *cones and any other items sold as a part of the end product that is offered for consumption to the retail purchaser* as scheduled in the Standard Operating Procedure Manual . . . The Dealer agrees to rely solely on Carvel's determination of price, from time to time . . . *Carvel agrees to sell to the Dealer the Dealer's requirements of supplies set forth in this paragraph,* unless prevented therefrom by act of God, governmental restrictions, labor difficulties, inability to obtain supplies, or similar contingency."

"SEVENTH: Carvel shall instruct the Dealer in the production of Carvel's Frozen Dairy Product, in its various forms, and in Carvel's merchandising methods and techniques. Carvel shall arrange for the training of the Dealer in the manner set forth in the Manual. The Dealer shall have the right to use the name 'Carvel' in connection with the sale of Carvel's Frozen Dairy Product. *As compensation for all of the foregoing,* the Dealer agrees to pay the Company *compensation of* 25¢ per liquid gallon."

* * * * * *

"EIGHTH: *The Dealer shall have the right to sell Carvel's Frozen Dairy Product and/or other items authorized for sale by him under the terms of this agreement at any price that the Dealer determines. Wherever Carvel recommends a retail price, such recommendation is based upon Carvel's experience concerning all factors that enter into a proper price, but such recommendation is in no manner binding upon the Dealer.*"

"NINTH: In connection with the operation of a Carvel Store and to comply with the specifications set forth in the Manual, the Dealer is required to purchase various items of machinery and equipment, and paper goods, a list of which is set forth in the Manual. To the extent that Carvel is able to supply the same, the Dealer shall have the right to purchase such machinery, equipment and paper goods, if he so desires, from Carvel, at prices fixed by Carvel from time to time. *The Dealer's obligation under this paragraph is satisfied so long as the Dealer equips his store and keeps it maintained in accordance with the specifications contained in the Manual. In the event that the Dealer desires to purchase his printed paper goods from sources other than Carvel, Carvel shall license manufacturers of such products to print the Carvel name thereon in connection with sales to the Dealer, with products made in accordance with Carvel standards.*"

* * * * *

"SEVENTEENTH: . . . . The Dealer recognizes that his Carvel Store is one of a large number of stores similarly built and selling to the public similar products, and hence the failure on the part of a single dealer to comply with many of the terms of this agreement could cause irreparable damage to all similar stores. . . ."

* * * * *

"TWENTIETH: This agreement is not assignable by the Dealer. . . ."

* * * * *

"TWENTY-SECOND: *Nothing herein contained shall be construed to give the Dealer any right or license in or to the use of the Carvel name or of any symbol, device or design of Carvel,* other than is specifically authorized hereunder or as may be hereafter authorized by Carvel *in writing,* and any use thereof so permitted by Carvel shall terminate on the date fixed for the expiration of the term of this agreement . . . *The Dealer acknowledges the validity of all trademarks and patents owned by Carvel, or under which it operates as licensee, and recognizes its obligation to protect such license and patents, and discontinue the use thereof upon termination of this agreement.*"

The franchisee signs other documents at the time he executes his franchise agreement which are supplemental and incidental to the franchise agreement itself. Thus the franchisee also enters into a "Signs and Special Equipment Lease" for a nominal annual rental which gives him the right to use certain promotional Carvel signs and a front plate on the dispensing freezer which puts an identifying swirl on the finished product corresponding to what appears on several registered marks (Pl. Ex. 6, R. 242, 3157). In the event the items leased under the Signs and Special Equipment Lease are required to be returned, Carvel is obligated to supply the franchisee with a new front freezer plate, without Carvel insignia, within no later than ten days after the franchisee making request therefor (Pl. Ex. 4, R. 240, 3156). The "Conditional Reassignment of Lease" (Pl. Ex. 7, R. 245, 3162) and the "Assignment of Lease and Assumption Agreement" (Pl. Ex. 7A, R. 250, 3162) all condition

rental of the Carvel building and the land on which it is erected upon the faithful compliance of the franchisee with the terms of the franchise agreement and provide, in substance, that Carvel is entitled to step into the franchisee's position as sublessee if there is any substantial breach of the franchise agreement, so that the distinctive Carvel building will continue to be used for and identified with the sale of Carvel ice cream.

The Carvel Special Formula Products

Ice Cream Mix

The findings below far from qualifying the existence, use and preservation of Carvel's special formula and secret process ice cream mix (R. *52, 434, 438, 453-454*), acknowledge Carvel's undiluted right to preserve its secrecy and "*Sell it to whomever it chose*" (R. *449*). This is the most important ingredient, by volume and cost, needed to make the finished ice cream product. Any mix for ice cream must conform to the federal standards of identity, which establish minimum and maximum limits for its constituent parts, i.e., milk fat, milk solids, sweeteners, emulsifiers, stabilizers and in some instances egg yolk solids. Wide latitude is granted for the use of fresh, frozen, powdered, or processed materials.[12]

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[12] 26 F.R. 11676, §20.1, the federal standards of identity promulgated by the Food and Drug Administration with respect to ice cream mix, provide that in addition to optional ingredients which may, but need not be added (such as liquid eggs, frozen eggs, dried eggs, stabilizer, emulsifier), the mix may include any one or more of the following ingredients: "Cream, dried cream, plastic cream (sometimes known as concentrated milk fat), butter, butter oil, milk, concentrated milk, evaporated milk, sweetened condensed milk, superheated condensed milk, dried milk, skim milk, concentrated skim milk, evaporated skim milk, condensed skim milk, superheated condensed skim

The uncontradicted testimony of the sales manager of the ice cream mix division of H. P. Hood (R. 180) shows that Carvel delivered to his company a secret formula for ice cream mix which differs from other mix formulas (R. 182, 190, 191), and which, in compliance with Carvel's insistence, has been kept confidential throughout the years from the beginning of the relationship between Carvel and this supplier (R. 191). In addition, Carvel uses another means of maintaining the secrecy by selling and delivering to its mix processors, a stabilizer-emulsifier made elsewhere by a formula which is not disclosed to them (R. 194, 199); use of this secret stabilizer-emulsifier is not the only respect in which the Carvel special formula mix differs from other formulas (R. 194). No other customer supplies its own secret stabilizer-emulsifier to the dairies (R. 196).

Carvel constantly assures itself that its secret mix formula is being used by receiving the processor's batch reports confirming the ingredients that were used in each batch "and the final laboratory test of the product" (R. 182, 254). The several supply contracts marked in evidence spell out the secrecy of the specifications, requirements for maintaining the secrecy, the furnishing of batch reports within twenty-four hours of completion of each batch, the packaging and labelling of the Carvel mix, the dairy's obligation to transport and make delivery pursuant to orders directly to the dealer of this perishable commodity, the invoicing for the deliveries on Carvel forms, the accounting

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milk, sweetened condensed skim milk, sweetened condensed part-skim milk, nonfat dry milk, sweet cream buttermilk, dried sweet cream buttermilk, and skim milk that has been concentrated and from which part of the lactose has been removed by crystallization. Water may be added, or water may be evaporated from the mix . . . ."

for all collections, subject to assumption by Carvel of credit risks, spoilage and returns; other incidental provisions provide a term of one year subject to cancellation upon ten days' written notice (Pl. Ex. 10, R. 252-261, 3186; Pl. Ex. 15, R. 337, 338-339, 345, 3205).

The supply contract with each of the processors of the secret Carvel mix selected by Carvel provides that Carvel will purchase all its requirements of the product with which the contract deals from that particular supplier (Pl. Ex. 15,[13] R. 338, ¶ 1, 3205). The processor covenants as follows (*id.* ¶ F, R. 341):

> "The processor agrees that he will deliver only Carvel mix to Carvel stores and no other ice cream mix or ice cream preparation of any kind."

The perishable nature of the mix makes direct and prompt delivery to the dealers in the small quantities they need, essential (R. 183).

The supply contract with Eagle Cone while providing that Carvel shall purchase all its requirements of cones corresponding to the specifications set forth, contains no provision, as in the case of the mix contracts, restraining Eagle from delivering other cones to the Carvel dealers. Eagle's covenant is merely that:

> "The supplier agrees to produce cones of the said design only for Carvel and for no other person."

In all other respects, the supply contracts are substantially the same (Pl. Ex. 24, R. 113, at 125, ¶ 1, 126, ¶ 4, 129, ¶ 14 (a), 3245).

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[13] The reference in the text is to the Rakestraw contract. See also, the Hood contract (Pl. Ex. 10, R. 252, 253, ¶ 1 and 255, ¶ F., 3186).

Other Carvel Special Formula End Product Components

To make the Carvel finished ice cream product, the dealer needs other ingredients and supplies. These he adds to the mix in preparation for putting the batch through his freezer to obtain the desired flavor (R. 179, 190-191). The finished product is a semi-solid that can be served as it emerges from the freezer-dispenser in an ice cream cone or in a sundae dish, or in a pint package, or it may be frozen to a low temperature and converted into the various hardened ice cream Carvel novelties (R. 192).

All puree and extract that is used by the dealer is purchased from Carvel which, in turn, has these items manufactured by firms which must make them in conformity with special formulas and specifications furnished by Carvel for each such item (R. 196-199).[14] Carvel arranges to purchase certain of the products for fruit flavorings at crop site auctions, similar to tobacco auctions; this is part of Carvel's specifications (R. 197), a circumstance of which the court below took note (R. *454*, fn. 4). It is important that the ingredients of each type of puree and extract used by the individual dealer in flavoring the ice cream mix conform exactly to Carvel formulas or specifications since an inferior ice cream product can result if a non-conforming puree or extract is used (R. 197-199). Ingredient specifications are related to the wholesomeness of the finished product as well as to its taste and general quality (R. 198). The standards specified to the Carvel suppliers are different than those used by the suppliers for their non-Carvel trade (R. 203).

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[14] The record does not contain any supply contract with a supplier of flavorings or toppings.

The various flavoring purees are packed in tin containers of pre-arranged weight, so that each tin contains the exact amount that will flavor a ten gallon can of mix; cocoa powder is packaged in bags containing exactly the amount necessary to flavor a ten gallon can of mix (R. 200, *454*). By this means, the uniformity of the Carvel finished product throughout the chain—as the findings below make plain—is further achieved (R. *448, 453*).

The Carvel Trademarks and Patents:

The Freezer

A Carvel patented narrow barrel is used in the freezer-dispenser sold by Carvel. This, like all other equipment, under the post-1955 franchise agreement may, but need not be, purchased from Carvel by its dealers (Pl. Ex. 1, R. 208, 212-213, ¶ "Ninth", 3148). Moreover, this, along with the Carvel design patented items, was found by the Court of Appeals to be "virtually without motivating significance in bringing about the [dealer's franchise] agreement." They were not "the focus of the arrangement" (R. *452*). The trial court found the patented items to be "incidental" in the Carvel distribution system (R. *56*, fn. 7).

There is no question but that Carvel regards its freezer as particularly compatible with its special formula and product ingredients (R. 197-198), and praises it in its promotional literature (R. 42). Nevertheless, it is open to the Carvel dealers to purchase a competitive freezer of comparable specifications (Pl. Ex. 1; R. 208, 212-213, ¶ "Ninth", 3148), and petitioners' counsel represented to the district court that there are many such available on the

market (*supra*, p. 8). This is confirmed by one of petitioners' exhibits (Pl. Ex. 24, R. 113 at 122, 3245).[15]

Petitioners did not produce evidence that Carvel ever denied a dealer's request to buy a competitive freezer. On the other hand, a number of exhibits demonstrate that Carvel did accept the specifications submitted for other pieces of equipment (R. 167-170; Defs. Ex. C-5, R. 295-314, 3525).[16] It is true, of course, that as an incident to the establishment of a new franchised outlet, the Carvel freezer-dispenser is part of the original "package" which a new dealer contracts to buy along with a beginning inventory. The inclusion of the freezer in the original "package" has not been shown to be a condition for the compulsory purchase of the rest of it. With regard to the subsequent purchase of an additional freezer-dispenser by a dealer who is expanding his operations, there is nothing in the record to show that Carvel discouraged or disapproved purchase of competitive freezers or other equipment.

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[15] Principal "national" companies making freezer-dispenser equipment for ice cream are identified in the exhibit as Port Morris Machine Co., General Equipment Co., Taylor Freezer Co., Sweden Freezer Co., King Freeze Co. and the Emery-Thompson Co. It is also stated that "'Mr. Softee', 'Tastee-Freez', 'Freezer Fresh' and hundreds of non-franchised operators . . . have their own ice cream making machines" (R.122).

[16] Uncontradicted evidence was introduced establishing that Carvel did in fact furnish specifications, and approve the installation of equipment meeting Carvel specifications from sources other than Carvel, by its dealers, including some of the petitioners herein (R. 167-170; Pl. Ex. 8A, § M; Def. Ex. C-5, R. 295-314; 11/27/59 Carvel letter to Hack, R. 295; 4/19/60 Carvel letter to Evangelista; R. 296; 11/2/61 Carvel letter to Mucha and Huba, R. 297; 1/25/60 Carvel letter to P. and A. Vignole, R. 297-298; 7/23/59 Carvel letter to Harriss and Wojcik, R. 299; 9/19/57 Carvel letter to Alfred and Francis Zeronda, R. 300; 9/4/57 Carvel letter to Mr. and Mrs. Frank Martone, R. 301-302; 11/2/61 Carvel letter to Mucha and Huba.

The Front Assembly Plate

This item, bearing a Carvel design patent, is included in the sign and equipment lease at a nominal annual rental (Pl. Ex. 6, R. 242, 3157). This front assembly plate which is removable (Pl. Ex. 7A, R. 250, 3162), like the signs and insignia equipment, functions to identify the Carvel product. It operates to impress a swirl as the ice cream emerges from the dispenser which is characteristic of the Carvel registered mark portraying the appearance of the product (R. 168). While all the franchise dealers are obliged to use this patented front assembly plate, its role and function is entirely promotional.

The Design Patent on the Carvel Building

The appearance, shape, style and dimensions of the Carvel building are uniform throughout the franchised chain and likewise serve the promotional purpose of making known to the public the identity and source of the product to be obtained there, namely, Carvel ice cream. This effect of the distinctive building is heightened by the neon illuminated signs and other Carvel insignia (Defs. Ex. C-2, Design Patents, 3485;[17] see R. *49*, R. *433-434;* Pl. Ex. 8A, § E, pp. 1, 10, § D, Part I, p. 1 and Part II, p. 8, 3165).

R. 302; 1/23/56 Carvel letter to *petitioners Mr. and Mrs. Paul Giberman*, R. 305; 6/17/57 Carvel letter to *petitioner Lester N. Modick*, R. 306; 8/30/57 Carvel letter to Mr. and Mrs. Murrell, R. 306-307; 8/22/56 Carvel letter to Mr. and Mrs. Caruso, R. 307-308; 5/24/56 Carvel letter to Mr. and Mrs. William King, R. 308-309; 6/8/56 Carvel letter to Mr. and Mrs. Knoch, R. 309; 9/25/56 Carvel letter to Frank Thomas, R. 310; 9/19/56 Carvel letter to Edward Pehrer, R. 310-311; 3/20/56 Carvel letter to Eli Pine, R. 312; 9/4/56 Carvel letter to Herman Eisenburg, R. 313; 5/15/58 Carvel letter to *petitioner Alfred Mueller*, R. 313-314).

[17] This exhibit like Pls. Ex. 8A was brought to the Court.

The Trademarks and Tradenames

Hardly anything is clearer in this case than the fact that the related Carvel companies use, and license the Carvel dealers to use, the Carvel trademarks and tradenames. Petitioners' contention (Their Brief, pp. 38-40), that Thomas Carvel, the owner of the registered marks, who also controls and is a principal owner of the Carvel companies, failed to authorize such use, cannot be taken seriously. Typical of the arrangement with regard to the use and licensing of these trademarks, is the testimony regarding one of the specialty products (R. 201):

> "The Court: Who owns the trademark on Lollapalooza?
>
> "The Witness: The trademark, I believe, is owned by Thomas Carvel and the use of it is granted to the various franchising corporations."

The name "Carvel" is made part of the name of each Carvel ice cream product offered for sale by the franchised dealers. Many specialty items are identified with their own registered marks, as for example: "Carvel Ice Cream Cake", "Carvel Tortoni", "Carvel Pre-Pack Tarts", "Carvel Papapalooza" and "Carvel Sno-balls" (Pl. Ex. 8A, § J, 3165). In addition, the containers, spoons, and other packaging and dispensing materials carry the imprint of the registered Carvel mark (*id.* § J, p. 23).

Obviously, this method of multiple and repetitive product identification has its greatest impact when the various Carvel ice cream products reach the consumer, mostly by personal service, rather than delivery. It is at the point of sale that the Carvel trademarks, tradenames, distinctive

building and uniform appearance of the product collectively attain a maximum degree of their promotional purpose.

Quality Control

Built-In Controls

There are two constants by which the quality control objectives of Carvel are realized. First, are the secret formulas and specifications for those supplies which are made part of the finished product (in various forms) which the consuming public buys from the Carvel dealer. The second constant is the quality control gained by pre-arranging the units of the flavoring and other ingredients for use with a ten gallon can of mix (R. 200). The Carvel secret formula mix is uniformly sold in ten gallon cans of standardized and specified weight (R. 184, 253), which, together with the other special Carvel ingredients, are accommodated to fit the freezer-dispenser (R. 197-198). These constants of quality control already mentioned in another connection, are supplemented by other techniques.

Dealer Training

The newly franchised dealer is required before opening his store to undergo full time training with an experienced Carvel dealer. (It was so stipulated, R. 150; see also R. 427). Before the new dealer can open his own store, he is tested at the end of the training period about his acquired operational "know-how" (Pl. Ex. 8A, § K, p. 3, 3165). During the training period, the newly franchised dealer learns how to apply the detailed instructions in the Carvel Manual (*id.*). The Manual or S.O.P. covers every aspect for using and cleaning the equipment, the manner of pro-

ducing various products, serving the customers and operating his retail business (*id.* § B, pp. 2, 4-5, 6-10, 13-14, 18; and § J; see also § G dealing with Sanitation, § H relating to the Carvel Supply Division, § M dealing with equipment specifications). He is taught and shown the scope of good merchandising procedures covered by the Manual, such as: standardized recipes and processes, amended and supplemented from time to time by added Manual sheets; quality and service standards, standards of physical cleanliness and appearance; promotional, advertising and showcase display techniques.

Supervision

To further insure uniformity and quality of operation by the franchisee, Carvel also employs a staff of supervisors. Their function is to visit each franchisee periodically, to assist him in any way necessary, and to inspect the franchisee's operation to ascertain that he is operating in compliance with the terms and conditions set forth in his franchise agreement and in conformity with the high standards Carvel expects of its franchisees (Pl. Ex. 8A, § K, p. 6; R. 413-414).

The Carvel Dealers' Position in the Franchise System

A dealer who operates a freezer dispenser on his premises to make and sell ice cream is within the classification of "manufacturer" under local laws and regulations, which require annual application for a permit attesting to the purity and wholesomeness of the ingredients, their use under sanitary conditions, and identification of the brand or tradename under which the products are sold (R. 329,

Massachusetts; R. 332, Connecticut; and R. 333, Pennsylvania).[18]

It is relevant to note *Riek-McJunkin Dairy Co.* v. *Pittsburgh School Dist.*, 362 Pa. 13 (1949), which held that while pasteurization and homogenization of milk do not result in a new product regardless of the changes in the milk, ice cream produced from the mix is a new and different article. The Carvel dealers' manufacturing function for obtaining the finished product requires commingling the Carvel special formula mix with the other selected secret formula ingredients, and processing them through the dispenser-freezer at appropriate temperatures and churning speed (R. 198). The point is not in dispute because petitioners requested and received a stipulation that the end product is different from the ingredients delivered by Carvel (R. 149). Petitioners further stipulated (R. 178-179) that the Carvel formula mix after delivery to the dealers is processed into an end product consisting of soft and hard ice cream in a variety of flavors. The pertinent finding in the district court reads (R. *58*):

> "The end product which was sold to the public *was Carvel ice cream*, and it was this product to which the Carvel trademark and good will attached."

The franchise agreement, like all contractual commitments, contains restraints operating to a greater or lesser degree upon the contracting parties. Under the circumstances of this case, the Court of Appeals, reviewing the

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[18] See Pennsylvania Act 483, approved May 20, 1949 and amendments, vol. 31 Purdon §§ 407, 412, 415; Conn. Gen. Stat. § 3913; Mass. Gen. Laws. Ch. 94; §§ 65 K, L, N, P; and substantially similar legislation in New York Agricultural and Market Law, Art. 4a, McKinney's Consolidated Laws, Book 2-B, § 71-a to § 71-m.

contractual restraints on the dealer in the Carvel franchising system in the light of their exclusive dealing and total requirement provisions, found that they were not proscribed by the antitrust laws; on the contrary, they served the public interest by protecting the integrity of products sold under the Carvel trademark (R. *448*).[19]

The trial court specifically found that what "draws the business to the Carvel operators" was "the uniformity of the stores . . . and the knowledge of the public of the uniformity and quality of the product" and further that: "The name Carvel constitutes a trademark of great value to the defendant and to the franchise operators" (R. *50*).

The petitioners' agreement to behave in a manner consistent with the rights and interests of other dealers in like economic positions and to protect the name and trademarks of Carvel, diminished but did not unreasonably impair their "independence", much less destroy their status as independent businessmen (R. *49*).[20] By voluntarily entering into

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[19] The reference is to the Opinion of Chief Judge Lumbard "writing for the majority in part" (R. *432*), who concluded the passage, saying (R. *448*):

> "Judge Dawson was fully warranted in concluding that in the context of the entire Carvel franchise system the requirement that no non-Carvel products be sold at the retail level is reasonably necessary for the protection of Carvel's goodwill."

[20] "The operation of franchise stores, of which Carvel is an example, is a comparatively recent development. Franchise stores differ from the older established chain store operations in which the managers of the stores were not independent operators.

"The franchise method of operation has the advantage, from the standpoint of our American system of competitive economy, of enabling numerous groups of individuals with small capital to become entrepreneurs. . . . The franchise system creates a class of independent businessmen; . . . The franchise system of operation is therefore good for the economy."

these franchise agreements, petitioners recognized that it was indispensable for them and the other dealers to adhere to the procedures for the protection of the Carvel name and trademarks. Such compliance would enable each dealer to realize his desire to be his own boss.

Benefits Conferred on the Franchised Dealer

The findings below fully supported by the record reflect the following principal benefits to the petitioners under the Carvel franchise system: (a) The dealer benefits by entering a specialized segment of the ice cream business and as a new business man immediately reaps the advantage of consumer acceptance of his products, the use of valuable trademarks and established good will which results from costly and effective promotional activities and successful experimentation and exercise of ingenuity in the development of the line of Carvel products (R. *50, 58* and *447-448*); (b) He benefits from the uniformity of the product, the uniform style in which it has been marketed, and the techniques developed and enforced for quality control (*id.*); (c) He gains competitive advantage from the incorporation of ingredients in his product made in accordance with secret formulas contributing to their high quality; (d) He benefits from his training in the merchandising of this specialized product by experienced and successful operators supplemented by the guidance in business management, merchandising, tried and uniform recipes of proven acceptance by consumers, and promotional and advertising procedures which are set forth in the Carvel Manual; (e) He benefits directly from the personal assistance offered and given by Carvel supervisors, and indirectly by the assurance that

their work of inspection and supervision is designed to maintain uniformity and high quality of the products; (f) He benefits from selection of a site for a store by those experienced in the matter and by the distinctiveness of the design and appearance of the building used by him and other Carvel dealers; (g) He benefits by the assumption by Carvel of all credit risks with relation to the items purchased from Carvel; (h) He benefits from the purchasing power of Carvel as a wholesale distributor (R. 200) of supplies purchased from suppliers who are in vigorous competition with each other (R. *443, 452*); and (i) He benefits because the price which the dealers pay Carvel "was less than they could have obtained if they bought in smaller quantities than Carvel" (R. *452*), and this applies to the price of those ingredients which are incorporated in the finished product and which the dealers are obliged to buy from Carvel, despite the 5% mark-up by Carvel (R. *443*, fn. 7).

Naturally, the full potential of these advantages is realized by the Carvel dealers in varying degrees. Their greater or lesser success differs according to their natural skill and capacity as merchandisers, their efforts, personality, ability to please customers and the variables that make one location better than another.

The Unitary Nature of the Carvel End Products

Although Carvel is a vendor of mix and flavoring ingredients, cones, supplies and equipment, it does not compete with the suppliers in those respective lines of business (R. *56-57, 443, 452*). Carvel's success is governed by the success of its franchised dealers in selling the finished ice

cream products under its name and trademarks. The dealer is told it is necessary to request that he buy from Carvel the mix and all those other items which are sold as part of the end product "because the public comes to the store to buy a 'Carvel' product—and it is a 'Carvel' quality product they sell in that fashion" (Def. Ex. C-1-B, R. 283 at 284, 3514). In this connection the trial court found that the dealers sell the public Carvel ice cream ". . . and it was this product to which the Carvel trademark and good will attached" (R. 58).

The Carvel end product is much more unitary than, for instance, a complete heating system incorporating many functioning parts or assembly of components (patented or unpatented) which can be sold separately. It is more unitary than the cameras sold with built-in light meters, which can be, and are, also sold separately. Carvel is not in the general business of a distributor or otherwise for the sale of its special formula ice cream mix, or of anything else for that matter. It restricts its role of vendor to make sales to its franchised dealers and only to them, in order that they may make the vendable ice cream to which the Carvel trademark attaches. Carvel's restriction upon the franchised dealers as buyers is limited entirely to those commodities which are incorporated within, and sold to the public as a part of, the Carvel ice cream. In that sense, under the facts and circumstances of this case, the restrictions of which petitioners complain apply to a unitary end product to which the Carvel trademark and good will attach.

These business and economic realities of Carvel's single-minded concern with the maintenance of the quality of the end product and the reputation of its name as well as

preservation of its trademarks provide roots for the findings in affirmance of the trial court:

(a) By a unanimous court that "the Carvel exclusive dealership arrangement withstands any attack on its legality" (R. *447*);

(b) by a unanimous court finding appropriate for decision of this case, the decisions of other trademark-antitrust cases, i.e.,

"Trademark licensing agreements requiring *the sole use of the trademarked item* have withstood attack under the antitrust laws where deemed necessary to protect the goodwill interest of the trademark owner . . . " (R. *448*), and also sustaining the trial court's finding that "the requirement that no non-Carvel products be sold at the retail level is reasonably necessary for the protection of Carvel's goodwill" (*id.*);

(c) by a unanimous court that

" . . . as the possessor of a secret formula for its ice cream mix, Carvel enjoyed the right to sell it to whomever it chose, and this right was not diluted by its agreement with Hood and Rakestraw to produce the mix. Carvel was free to insist that Hood and Rakestraw produce the mix solely for Carvel and subject to Carvel's wishes as to its disposition" (R. *449*);

(d) by a unanimous court that there was

"no merit in the plaintiffs' claims" that [Hood, Rakestraw and the other] suppliers would not sell non-Carvel products to the individual dealers" because "Carvel cannot be considered in competition with these suppliers . . . and such an agreement not to deal, even if established, when effected by non-competing enterprises is not illegal" (*id.*);

(c) by the court below that the facts of the case fail to qualify under the authorities as a tying arrangement because there was no proof of a tying product,—a deficiency *incurable by resort to presumption* of "dominance" or sufficient "economic power," on the law and the facts (R. *452*) and for the further reason that "the 'tied' sales here complained of . . . must be a minor part" of sales otherwise "not insubstantial" (R. *451*), but so far as the individual dealers are concerned so inconsequential as to make unlikely anything other than trivial damage (R. *451, 455*); and

(f) by further related findings of the Court of Appeals in concurrent result with the corresponding findings of the district court, that Carvel's control over the purchase and use by its dealers of the Carvel mix and other ingredients was necessary in order to protect good will under circumstances where it is practically impossible to furnish specifications to suppliers in the market, because to do so would carry no assurance of being able to preserve the quality or uniformity of the texture and taste of the trademarked products, that the attempt to do so would impose impractical and unreasonable burdens of formulation (R. *52*) and would in all events necessitate an inspection and policing system so formidable as to be unfeasible in view of the limited nature and small volume of business (R. *54*).

It is only by fragmentation of the finished product into its components that it becomes possible to find products

which are supposedly "tied," not to a "tying" product (patented or unpatented), but—as the dissent below would have it—*to license of a trademark*. The incongruity of regarding the mix, which the dissent concedes (R. *449*) is made "in accordance with a secret formula" as tied to the Carvel trademark was noted by the Court of Appeals (R. *451*, fn. 2). Although the mix is by far the most important product sold by Carvel by function and by dollar volume, the same incongruity exists as to those other ingredients which are part of the finished product sold to the public.[21] (Carvel, as already noted, is not a competitor of the suppliers of mix, flavors and cones.) The unitary nature of the finished product must rather lead to recognition of the *Carvel ice cream* as the focus of the entire franchising arrangements. The trademark which is licensed is not for mix or flavorings but attaches to the end product. The trademark on the Carvel ice cream symbolizes the good will of the business which is dependent upon uniformity and high quality.

It is in accord with the realities of this case to recognize that the economic motivation both of Carvel and its dealers for entering into franchise agreements, is centered upon the effective marketing of the unitary finished ice cream product under the Carvel name and trademarks. In this light, the validity of the Carvel franchise agreements, which in

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[21] The majority opinion after first pointing out (R. *451*, fn. 2) that sales of all "ingredients" to dealers other than mix average less than $3,400 per dealer per year and that "the record does not make it clear whether all these 'ingredients' were tied", states:

> "Two-thirds of the figure of $3,965,923 in Chief Judge Lumbard's opinion constitute sales of the Carvel secret formula mix which surely could legally be tied to the Carvel trade-mark if that mark was to retain its significance, as he concedes."

this case all embody the post-1955 provisions,[22] must be determined under the standards established by this Court applicable to total requirement and exclusive dealing agreements. Application of these standards to fact findings in which both courts below fully concurred sustains the conclusion that the restrictions of the Carvel franchise agreements were not unreasonable. In addition, both the district court and a unanimous Court of Appeals specifically refused on the facts to attribute to Carvel abuse or misuse of the Carvel trademarks. Unless there is a showing of clear error in the concurrent findings of fact by the courts below, which we submit is entirely lacking here, this appeal is without merit.

SUMMARY OF ARGUMENT

I.

Petitioners represent in their brief that what the courts below "have done is to immunize a trademark owner against the proscriptions of the Sherman and Clayton Acts" (Their Brief, p. 68). Neither the record nor the opinions disclose any basis for this assertion. There has been no departure by the courts below from the accepted and usual course of judicial proceedings in the consideration and decision of this case on any aspect of antitrust law, the law of trademarks, or in any other respect. In our view, petitioners' brief is nothing less than a plea for this Court to disregard the concurrent findings of both lower courts and to make its own findings de novo. This is con-

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[22] The separate question of price fixing under the post 1955 franchise agreement urged by petitioners will be considered in Point V, *infra*.

trary to the settled rule of this Court except upon a showing of clear error, which is wholly lacking in this case.

The decisions of the courts below affirm the validity under § 1 of the Sherman Act and § 3 of the Clayton Act of the basic agreements upon which the Carvel franchise system depends, namely: (a) the Carvel dealer franchise agreement which petitioners brought under attack for allegedly involving illegal price-fixing, and also regulation and control of the purchases by dealers of those ingredients (made for Carvel by secret formula), which become part of the end product they sell to the public under Carvel trademarks; and (b) the agreements with suppliers by which Carvel contracts, a year at a time, to purchase its total requirements of the aforementioned end product ingredients.

In the light of the purpose and scope of the relationship between Carvel and its franchised dealers, the franchise agreements were by their nature and effect found to constitute total requirement and exclusive dealing contracts. So regarded, a unanimous Court of Appeals made findings confirmatory of, and supplemental to those of the District Court, that the restrictions complained of in the franchise agreements were economically justified and represented appropriate measures for a trademark owner to assure the quality, genuineness and uniformity of the end product sold under its trademark; that their antitrust significance is ascertainable, not by the rule applied to conduct which is unlawful *per se*, but by the standards established by this Court for evaluating contractual restraints by the rule of reason. Under the latter standards, the concurrent findings were to the effect that petitioners failed to prove that the

franchise agreements constituted or effected unreasonable restraints upon commerce.

These findings and conclusions of the courts below have substantial, and for the most part uncontradicted support in the record; in any event, it is scarcely susceptible of reasonable doubt that these findings and conclusions are free of clear error.

II.

Petitioners contend that the Carvel franchise agreement includes an illegal tying arrangement. The courts below examined the matter in considerable detail. Upon findings of fact amply supported in the record, both courts found that the terms of the franchise agreement did not present the factual prerequisites of a tying arrangement; further that even if a tying arrangement were present, the evidence was sufficient to show that the franchise provisions were justified as reasonable measures to protect the good will of Carvel's business; that the end product, sold under Carvel trademarks, depended for quality, taste and customer-appeal upon ingredients specially made by secret Carvel formula; that protection of good will, on the facts of this case, by publication of standards to enable dealers to buy all the various types of end product ingredients from suppliers of their choice, would impose impractical and unreasonable burdens upon Carvel.

Petitioners find partial support for their position with respect to "tying" in the dissenting opinion below. The crux of the dissent was to recommend remand of the cause to the district court for the specific purpose of "a further hearing limited to the issue of justification." Unlike the

Court's majority and the trial court, the judge in dissent considered the evidence of justification inadequate.

Petitioners ignore the findings of both courts, expand the limits of the dissent and urge that Carvel should be compelled to divulge the specifications and standards for all of the ingredients "to any supplier from whom a licensee wishes to purchase." *At the same time* petitioners would permit the Carvel dealer to make ice cream in accordance with any other specifications, provided the consumer is informed that "it is not Carvel ice cream", unless it is sold under a different mark or name from the distinctive store identified by the public with Carvel (Their Brief, p. 45).

These contentions are not made by petitioners in any context of an attempt to show clear error. They reflect disagreement of petitioner with the findings rather than claim error documented by relevant facts or law.

We answer the further position that Carvel conditioned the sale and lease of patented equipment to the dealers upon their assumption of obligations to purchase all their requirements from Carvel or from Carvel designated sources. This is directly contrary to the findings of the courts not excluding those in the dissenting Opinion.

III.

The restrictive provisions of the franchise agreement are not in the nature of a tying arrangement. There is no "tying" product. Furthermore, a "tied" product is lacking. Carvel is not in the business of making and selling ice cream mix or other ingredients; it is not a competitor in the markets where suppliers of such articles are in com-

petition. There is vigorous competition in the markets for those commodities. Carvel is a wholesale buyer of all its requirements for resale to its dealers. Carvel sells only to its own franchised dealers. This system of business is necessarily related to the reason for the existence of the Carvel business which is to distribute by means of a franchise, the Carvel ice cream made in accordance with Carvel's secret formula and sold under its trademark. The dealers benefit from Carvel's ability to pass on to them the advantages of its buying power as the evidence demonstrates; from the constant availability of the supplies which Carvel buys on its credit and resells in small quantities to the dealers as needed; from the reputation of the end product gained not only by its quality but by its uniformity and its identification with an established trademark of great value; and further in many other ways inherent in a franchising system of distribution which enables persons of small means to establish and maintain themselves in retail businesses without the limitations which would otherwise be imposed upon them if they were new corporate employees. In the absence of factual prerequisites for tying arrangements, the restraints of the franchise agreement become measurable by standards of reasonableness applicable to total requirement and exclusive dealing agreements.

In line with what is said in the dissenting opinion, the petitioners adopt a concept of tying arrangements which has novel characteristics. Under this concept the license of the trademark becomes the "tying" product. What the dealers need to buy for incorporation into the end product is regarded as the "tied" product. This concept presents basic problems and incongruities, factually and legally.

Preliminarily, it is clear that even assuming the presence of tying characteristics, the tying element is not embraced by the language of § 3 of the Clayton Act. Such a tying device could be reached under § 1 of the Sherman Act, but in that event, the petitioners' proof must meet the standards applicable to a § 1 violation. They are more stringent than the standards applied under the qualifying "tend to create . . ." clause of § 3 of the Clayton Act.

Petitioners obtain no mileage from this concept of a tying arrangement for the simple reason that both lower courts, amply supported by substantial evidence in the record, concluded that petitioners' evidence of anti-competitive effect is woefully insufficient. This inadequacy of proof is fatal even assuming that a presumption based on trademark (by analogy to the patent and copyright cases) is invoked to cure the inadequacy of petitioners' proof of sufficient economic power over the tying product (the license of trademark), to effect a forbidden restraint on the tied products (the ingredients). The innovation of a presumption at one end becomes, under the circumstances of this case, entirely futile because of the inadequacy of proof of anti-competitive effect, at the other. The figures showing the insubstantiality of the commerce effected need not be repeated in this summary. They are found in the Opinion of the Court of Appeals (R. *451-452*).

We argue that it is inappropriate to import into antitrust enforcement a presumption based on trademark. Prior decisions show that there is no difficulty in recognizing the misuse of a trademark to cloak activities condemned by the antitrust laws. This is, of course, true of the patent and copyright cases as well. The fact situations

in those decisions reveal encroachment upon the antitrust laws, not because of, but despite, the involvement of a patented or copyrighted article. The modifying phrase in § 3 of the Clayton Act—"whether patented or unpatented"—confirms that the ascertainment of antitrust violation is not to be inhibited by such statutory advantage. This is far from saying that the existence of a patent or copyright is a substitute for proof under standards applicable to a given fact situation.

In any event, the right of trademark is not a statutorily granted monopoly. The rights of trademark go along with business or trade and may embrace a multitude of products. The widespread use of licensing trademarks is well known. The magnitude of the practice may be inferred from an examination limited to items in the ice cream field, in five states (Appendix "B" to this brief), which discloses the impracticability and undesirability of accepting the innovation of a presumption based on trademark.

The presence and importance of the Carvel secret formulas which provide built-in assurance of quality control for the end product, accentuates the impracticability of such presumption which would, in any event, prove superfluous.

IV.

As in the case of the franchise agreement viewed as a total requirement and exclusive dealing contract, so in the case of the supplier contracts under attack, the criterion for determining their validity is their reasonableness or lack of it. The concurrent findings of both courts (including the unanimous opinion of the Court of Appeals) are to the

effect that they were motivated by lawful business reasons and did not bring into being unreasonable restraint upon commerce. Findings on this score are fully substantiated in the record. There is nothing pointed out by petitioners which shows that they are clearly erroneous.

V.

With respect to petitioners' contention that suggested or recommended prices in the post-1955 Carvel franchise agreement amounts to illegal price-fixing, it is also obvious that petitioners are seeking a *de novo* determination by this court on the facts, through inferences to be drawn from them, resolution of supposed conflicts and the like.

A unanimous Court of Appeals by its own explicit findings concurs entirely with the findings in the District Court that an illegal price-fixing or price-maintenance plan or scheme, was non-existent under the post-1955 franchise agreement. The specific finding by the Court of Appeals that there is much evidence in the record to support the findings of the trial court is sufficient for the application by this Court of its settled rule not to reappraise facts *de novo* in the absence of a showing of clear error.

VI.

It has been our endeavor to address ourselves to matters of substance and importance. We submit in the light of the record as a whole, and considering petitioners' brief, that there is no indication on any of the issues involved that clear error can be found in the concurrent findings of the Court of Appeals and of the District Court below.

ARGUMENT

I.

Carvel did not make use of illegal tying agreements.

A. Petitioners by Their Argument to Show Illicit Tying Agreements Require Nothing Less Than for This Court to Disregard in Their Entirety the Conclusional Findings of the Court Below.

The petitioners begin by phrasing the questions presented on this appeal as though the Court of Appeals, from whose judgment they are appealing, failed to recognize the illegality of an exclusive dealing contract which includes "a proscribed tie-in arrangement," and the misuse of trademark protection to insulate "proscribed tying and exclusive dealing contracts" (Their Brief, p. 3). This circularity of reasoning is too obvious to deserve notice beyond observing that it definitely conditions their attempt to apply prior decisions of this Court to an exposition of the evidence directly contrary to the record and findings by the courts below (*id.*, pp. 29-35; and App. "A," to our Brief).[23] By this route, they conclude that:

> "In effect, what the District Court and Court of Appeals have done is to immunize a trademark owner against the proscriptions of the Sherman and Clayton Acts" (*id.* 68).

It will be made plain, if our summary of the record has not already done so, that no questions of this character are tendered on this appeal.

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[23] To illustrate the extent to which petitioners' exposition of the evidence is directly contrary to, and unsupported by the record and findings of the courts below we set forth an analysis of certain of the statements made by petitioners in the first nine pages of their Brief in our Appendix "A" hereto (Our Brief, pp. 1a-9a).

Petitioners' argument that this case presents unlawful tying agreements in violation of § 3 of the Clayton Act and § 1 of the Sherman Act, of *per se* character, reflects a search for a shortcut to substitute for their failure of proof (*id.* 20-29). They say that the tying product(s) which is definitionally necessary for an unlawful tying agreement under § 3 of the Clayton Act consists of Carvel's sale, loan or lease of patented and unpatented equipment "to the dealer" (*id.* 24). They say further that "a patent is sufficient to supply the requisite of 'dominance' for the application of the *per se rule* . . . to tying arrangements" (*id.*). This is followed by petitioners' acknowledgement that (*id.* 25), "The Trial Court found that there was no evidence that Carvel had the dominance . . .", and that the finding of the Court of Appeals (referring to the opinion of the Court as "the concurring Opinion"), was to the effect that Carvel's patented items cannot be considered the tying product. They stopped short of quoting that court's specific finding:

> "In this case, the patented items appear to have been virtually without motivating significance in bringing about the agreement" (R. *452*).

Accordingly, it is quite plain that petitioners are asking this Court to disregard in their entirety the concurrent findings of both lower courts and de novo to adopt the directly opposite findings presented by the petitioners. In addition, they urge adoption by this Court of the views expressed in the dissent by Chief Judge Lumbard of the court below that the holding of *United States* v. *Loew's, Inc.*, 371 U.S. 38 (1962), should be extended by presuming "from the use of the Carvel trademark as the principal feature of the Carvel

system" the requisite economic power to exert economic leverage, notwithstanding *"the absence in the record of substantial economic data"* (R. *441*). By invoking presumptive power over a tying product, petitioners assume that all proof of *justification* is precluded, and that proof of a not insubstantial amount of commerce would suffice because the availability of such presumption would automatically transfer this case to the category of a *per se* violation both under § 3 of the Clayton Act or § 1 of the Sherman Act. That this position represents a misreading and misapplication of the decisions of this Court and even a rejection of the dissenting opinion on the propriety of proof of justification (Their Brief, p. 15), will be shown later in our argument. Here it will suffice to refer to petitioners' statement of the rule which they would have this Court adopt and apply to this case, namely:

> "So long as the seller is of sufficient size to exert some power, and the amount of commerce restrained is not insignificant, the standard [of *per se* violation] is met" (Their Brief, p. 28).

Our position is that it was correctly decided below: (i) that if the Carvel trademark be assumed and regarded to be the tying element, evidence of sufficient economic leverage of the Carvel trademark is indispensable under the circumstances of this case, and that the conceded lack of evidence to prove Carvel's position of sufficient economic power is not curable by resort to presumption; (ii) that it is inappropriate to presume sufficient economic power from the license of Carvel's trademark; (iii) that there is no proof of a tying "product" within the meaning of § 3 of the Clayton Act; and (iv) that there is no evidence of substantial injury to competition required under § 1 of the

Sherman Act which governs tying arrangements not within the purview of the Clayton Act.

B. The Courts Below Found that Petitioners' Evidence Was Not Sufficient to Prove a Tying Agreement Forbidden Either by § 3 of the Clayton Act or § 4 of the Sherman Act.

The typical tying agreement involves the sale or lease of a product by a seller in possession of sufficient economic power over the tying product, to force the buyer desirous of acquiring it, to purchase another or tied product. The seller under such agreement runs afoul of § 3 of the Clayton Act upon a showing of wrongful effect upon the commerce in the tied product. The rule for ascertaining illegality applied to such circumstances, is less stringent than the criteria of illegality under § 1 of the Sherman Act. Under the less stringent rule the language of the "effect" clause of § 3 is satisfied when such a seller exacts the condition for the purchase of the tied product to an extent shown to involve a "not insubstantial" amount of commerce because its effect "may be to substantially lessen competition or tend to create a monopoly in any line of commerce." On the other hand, illegality of tying arrangements falling outside the language of § 3 of Clayton depend on proof of sufficient economic power over the "tying" element to have the effect substantially to restrain free competition in the market for the tied product. *United States* v. *Loew's, Inc., supra*, at 45, 49; *Brown Shoe Co.* v. *United States*, 370 U.S. 294 (1962) at 328-330; *Northern Pac. R. Co.* v. *United States*, 356 U.S. 1 (1958) at 6, 7 and fn. 6, 9; *Tampa Electric Co.* v. *Nashville Coal Co.*, 365 U.S. 320 (1961) at 326-329, 334-335; *Times-Picayune Pub. Co.* v. *United States*, 345 U.S. 594 (1953) at 608-610.

When this Court dealt in *Times-Picayune Pub. Co.* v. *United States, supra,* with a tying arrangement which did not involve a "product" under § 3 of the Clayton Act, the reasoning was to the effect that such "tying" condition would come under the interdiction of § 1 of the Sherman Act "whenever both conditions are met" (345 U.S. at 609). This referred to the stricter Sherman Act rule which requires proof of (or an appropriate basis for inferring) the existence of dominant or sufficient economic power in the market for the tying product *and* its use to restrain a substantial volume of commerce in the market for the tied product. Since the evidence in that case was found not to meet such standard of proof, the decision of the district court was reversed.

Times-Picayune, a Sherman § 1 case, did not apply the rule adopted under § 3 of the Clayton Act in *International Salt Co.* v. *United States,* 332 U.S. 392 (1947). *International Salt, supra,* affirmed summary judgment for the government in a case brought under both § 1 of the Sherman Act and § 3 of the Clayton Act. It involved forced purchase of commercial salt tied to the sale of patented salt dispensing machines. The presence of conditions affecting the sale of products "whether patented or unpatented"—as § 3 of the Clayton Act reads—led this Court to apply the less stringent rule because that section prohibited agreements (332 U.S. at 396) "which 'tend to create a monopoly', and it is immaterial that the tendency is a creeping one rather than one that proceeds at full gallop . . .".

While dominance in that case was stated to be presumed from the existence of statutorily granted monopoly over

the patented salt machines, the decision is now not understood to mean that the patent over the tying product was basic to the decision. The opinion in *International Salt* (decided on the pleadings), discloses a factual support for finding dominance, independent of the patent, namely, that (332 U.S. at 394):

> "It was established by pleadings or admissions that the International Salt Company is engaged in interstate commerce in salt, *of which it is the country's largest producer for industrial uses.*"

Understandably then, this Court found no error in the granting of the government's motion for summary judgment because further proof of a dominant position of a competitor of that status in a particular market was wholly superfluous. This provides context for the observation in the later decision of *Northern Pac. R. Co.* v. *United States*, 356 U.S. 1 (1958) at 9, that the tying arrangements in *International Salt* were held "unlawful *despite* the fact that the tying item was patented, not because of it."[24]

It is true, of course, that *United States* v. *Loew's, Inc., supra*, is of material significance in this case for a variety of reasons. The one pertinent to the subject under discussion at this point, is not the presumption of dominance from a copyright with respect to which the case followed earlier motion picture decisions, notably *United States* v. *Paramount Pictures, Inc.*, 334 U.S. 131 (1948). What is significant here is the other half of the coin, namely, what this Court actually decided with respect to proof of anti-

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[24] The Court below makes reference to this observation (R. 454, fn. 5); see also the further statement in *Northern Pacific*, 356 U.S. 1, at 10, fn. 8.

competitive effect on commerce. If we are to understand the implications of the suggestion in the dissenting opinion in the Court below to invoke the same presumption of dominance in the case of a trademark, which in the context of the record was deemed wholly inappropriate in the majority opinion (R. *452*), it must be understood that the more stringent rule under § 1 of the Sherman Act becomes applicable to this case. This we respectfully submit, was overlooked in Chief Judge Lumbard's dissenting Opinion.

We read *United States* v. *Loew's, Inc., supra,* as showing application by this Court of the more stringent rule in affirming the conclusional findings of fact by the district court. This Court having presumed from the licensing of copyrighted feature motion picture films the existence of dominant position,[25] held that there was no question ". . . of the adverse effects on free competition resulting from appellant's illegal block booking contracts" (371 U.S. at 49). After commenting upon the inferiority of a considerable number of the tied films, the Court further elucidated the basis for illegality under § 1 of the Sherman Act, saying, (*id.*):

> "It is therefore clear that the tying arrangements here both by their 'inherent nature' and by their 'effect' *injuriously restrained trade.*"

In this perspective we refer to the specific finding of the Court of Appeals in this case that the proof which petitioners, as plaintiffs, produced "showed *neither* that Carvel had 'sufficient economic power with respect to the tying product to appreciably restrain free competition in the

[25] This Court stated that the findings of the district judge, supported by the record, confirm the presumption (371 U.S. at 48).

market for the tied product' nor that 'a not insubstantial amount of commerce is affected'. Indeed, such figures as exist would prove the contrary" (R. *451*).[26] Proof insufficient to meet the test of illegality of a violation under § 3 of the Clayton Act is all the more deficient under the more stringent measuring criteria of conduct forbidden by § 1 of the Sherman Act. *Tampa Electric Co., supra,* at 335; *Times-Picayune, supra,* at 608, 609; see also *Brown Shoe Co.* v. *United States, supra,* at 328-330. A unanimous Court of Appeals rejected petitioners' notion "that anti-competitive effects may be inferred solely from the existence of such a network of exclusive dealerships." (R. *447*). It was plain, said the Court, that petitioners failed in their burden to prove foreclosure of competition in a substantial share of the line of commerce affected; also, that petitioners failed to show that Carvel's dealership system lacked economic justification. On that account, the Court of Appeals approved of the findings by the district court, that the trademark or tradename was the cornerstone of a franchise system, and that the public interest was served by the identification of "each Carvel outlet as one of a chain which offers identical products at a uniform standard of quality." (R. *448*). These and other findings below, adverse to petitioners, disclose that the sufficiency of petitioners' proof was not evaluated within the strict boundaries of their self-limiting stipulation to establish a case of *per se* violation of the antitrust laws. To illustrate, the Court of Appeals was in accord with the finding of the district court on the facts, that (R. *59*):

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[26] The figures are summarized *infra*, Point IVA. The district court below found that " . . . the arrangement here involved is not the type which could be held illegal under the provisions of either § 1 of the Sherman Act or § 3 of the Clayton Act" (R. *57*).

"The plaintiffs made no showing, as ordinarily required under the cases, that Carvel occupies a dominant position as a franchiser of soft ice cream or seller of ice cream freezers, or even that a substantial amount of commerce in the 'tied' products was foreclosed. In the absence of these facts there is no basis for recovery. Times-Picayune Publishing Co. v. United States, 345 U.S. 594, 73 S. Ct. 872, 97 L. Ed. 1277 (1953)."

C. The Factual Prerequisites for Illegal Tying Arrangements Are Absent in the Carvel System of Doing Business.

The courts below were correct in finding that petitioners failed to prove either the presence of a tying element, or other products which were "tied". In other words, it was found that the restrictions of the Carvel franchise agreements involved provisions for purchase of total requirements and exclusive dealing, but did not include tying arrangements. The facts which *were* proven reveal abundant support for the factual conclusions that the basic characteristics of a tying arrangement were wholly absent, as the following analysis shows.

1. Neither the freezers and related equipment which Carvel sold, nor the identifying signs or front assembly plates for the freezers which were rented for a minimal fee, nor any other ingredient which Carvel also sold, were found to be of such prominence, uniqueness or desirability as to be the motivating or focal force to induce dealers to enter into the franchise agreement for the purpose of buying any one or more of such articles. The findings are to the exact contrary (R. 452; see also R. 56, fn. 7). Primarily, then, there is no tying product in the form of "goods . . . machinery,

supplies or other commodities either patented or unpatented . . .", sold or leased, conditioned upon the purchase or lease of other goods,—within the language of § 3 of the Clayton Act. Whether it is appropriate to regard the Carvel trademark as the tying element, a suggestion in the dissenting opinion which the Court of Appeals rejected (R. *452*), will be dealt with separately, *infra*.

2. Whatever the "tying" element might be, the problem of the legality of a tying restriction is not presented in the absence of proof of a "tied" product. On the facts in this case, there are no tied products for the following reasons:

a. Judicial scrutiny of tying arrangements emphasizes that the seller conditions the availability of the desired main or tying product upon the purchase of another tied article in order to expand or improve his competitive position in the market for the tied product. This is not the case here. It is true that Carvel competes in the market with other ice cream franchising organizations like Dairy Queen, Tastee Freeze and the like and others selling trademarked ice cream products (R. *451*). However, it is equally true that Carvel does *not* compete in the various markets wherein its suppliers compete with others in the sale of mix, cones or flavorings.

b. A characteristic of a genuine tying arrangement involves the forced purchase of a tied article which is not desired by the buyer either because of its inferiority, as in the case of second rate or less desirable motion pictures compared with desirable first rate feature films (involved in *Paramount, supra*, and *Loew's, supra*), or because its compelled acquisition neither adds benefit to the buyer (as pointed out in *Northern Pacific, supra*), nor provides any

particular reason for buying the item from the seller rather than from others in the market (as in *International Salt, supra*).[27]

c. The induced purchase by gasoline dealers of TBA products sponsored but not directly sold by their gasoline supplier, demonstrates in yet another way the absence of offensive "tie-in" characteristics in the Carvel franchise system. This appears from the sharp contrasts of the evidence in this case with the basic facts shown in *Osborn* v. *Sinclair Refining Co.*, 286 F. 2d 832 (4th Cir. 1960), *cert. denied* 366 U.S. 963 and *Goodyear Tire & Rubber Co.* v. *United States*, 331 F. 2d 394 (7th Cir. 1964); see also *Texaco* v. *FTC*, 336 F. 2d 754 (D.C. Cir. 1964).[28]

In *Osborn* v. *Sinclair, supra*, dismissal by the district court of the claim for treble damages was reversed. That case presented no genuine question that *Sinclair's* position and share of the market in the tying product of gasoline was one of sufficient economic power appreciably to restrain commerce in the *Goodyear* TBA products. The tying pressure was applied due to *Sinclair's* undertaking for a 10% commission to promote and advocate among its

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[27] *United States* v. *Loew's, Inc., supra*, 371 U.S. 38 at 40, 48 and fn. 6; 49; *United States* v. *Paramount Pictures, Inc., supra*, 334 U.S. 131 at 157, 158; *Northern Pac. R. Co.* v. *United States, supra*, 356 U.S. 1 at 8; *International Salt Co.* v. *United States, supra*, 332 U.S. 392 at 396, 397.

> "To use the trial court's apt example, forcing a television station which wants 'Gone With The Wind' to take 'Getting Gertie's Garter' as well is taking undue advantage of the fact that to television as well as motion picture viewers there is but one 'Gone With The Wind'." (371 U.S. 38 at 48, fn. 6.)

[28] This Court noted jurisdiction in the *Goodyear Tire and Rubber Company* and *Texaco* cases during the October term, — U.S. —; — U.S. —.

dealers their purchase from *Goodyear* of TBA products. Earning the commission was found to be the sole business motive for *Sinclair's* policy to promote the sale of the *Goodyear* products *supra*, 286 F. 2d 832 at 834; this policy "went beyond mere persuasion or salesmanship . . . and constituted an actual requirement and condition for the continued sale of gasoline . . ." (*id.* at 836). Above and beyond *Sinclair's* profit motive for adopting the tying device, the Court of Appeals, in reversing the district court, found that the dealers' need and use for the tied TBA products were unrelated to his desire to purchase *Sinclair's* gasoline (*id.* 840). *Goodyear Tire and Rubber Co., supra*, involved the same basic business relationships as in *Osborn* v. *Sinclair, supra*, and was regarded as "a classic example" of the use by a large national distributor of gasoline of its economic power in that market to destroy competition in the market for TBA products, thereby realizing very large profits in the form of commissions from the tied products unrelated to its main business, *supra*, 331 F. 2d 394 at 395, 403.[29]

The distinctions between the business relationships in those cases and the relationship between Carvel and its dealers are very marked and apparent. (1) Unlike the independent TBA products unrelated to the market in gasoline, the dairy mix and the other special formula ingredients are not only directly related to Carvel's reason for being in business, but are the very heart and body of the finished ice cream product sold under the Carvel trademark. The cited gasoline cases presented no question of licensed trade-

[29] *Atlantic Stations* aggregated 3.4% of the total number of service stations in the United States and its sales were 2½% of the gasoline sold in the nation (331 F. 2d 394 at 403).

marks. (2) Another contrast consists of the finding that the oil company's sponsorship of the tied and unrelated TBA products had a pernicious effect upon the inter-brand competition of suppliers marketing TBA products. In this case, the fact findings are directly opposite, namely, competing suppliers of mix and other ingredients were able to compete for supply contracts with Carvel which ran for a year (R. *452*); and such competition was conceded in the minority opinion to be probably "vigorous" although perhaps not available in equal measure to smaller suppliers capable of selling to individual stores but less capable of meeting "Carvel's price and service demands" (R. *443*). (3) There is another and more fundamental contrast between the sponsorship by the oil company of TBA and the requirement by Carvel that its dealers purchase its mix and other essential ingredients. This fundamental difference rests upon the total contrast in the business relationships in the two situations. In *Goodyear, supra,* the dealership contract did not bind the dealers to buy particular TBA products. It was after the dealer was established in that capacity and during his dealership that he became subject to the gasoline producer's salesmanship and sponsorship of the TBA products, which the courts, on the facts, found to be coercive. This is altogether different from the route by which the Carvel dealer is initially apprised of his obligation set forth in the franchise to buy the essential components of the Carvel finished ice cream, and his reasons for assuming the obligation.

It is too obvious for argument that anybody can enter the retail ice cream market. One can do so as an incident to operating a food shop or a drugstore, a candy store or

an ice cream parlor. One can do so by acquiring or leasing or licensing the use of a mobile ice cream merchandising unit. If one is interested in becoming a franchise operator, he has a choice of joining one of the many franchising chains competing with Carvel. If he wants to become a Carvel dealer, it is the result of a decision in favor of selling not anybody else's ice cream, but the Carvel ice cream product under the Carvel trademark. He knows in advance that he will be selling to the public ice cream of uniform quality, standardized for him and the other dealers with respect to contents and style of service, uniformity of the structure, similarity of the exterior and interior appearance of his store,—as compared with the stores of the other Carvel dealers,—and that he will have the opportunity to benefit from the established consumer acceptance of the Carvel product presented to the public through various insignia and other promotional devices featuring the Carvel name, not his own. If in electing to become a Carvel dealer, he gives up some measure of his independence,[30] it was his decision so to do, for the purpose thereby to make more and not less money out of his business. In this context, the obligations which he has undertaken in the Carvel franchise agreement possess none of the characteristics of a tying arrangement, but rather of a total requirements and exclusive dealing relationship.[31] So regarded, the Car-

[30] He also loses some independence by the need for complying with health laws etc., and qualifying to obtain and keep his permit to process and sell perishable food products, etc.

[31] We have already shown (*supra*, pp. 7-10) that the complaints in the actions instituted by the petitioners reveal no claim based on illegal tying agreements; that their grievances against Carvel were predicated on the restrictions of their franchise agreements relating to total requirements and exclusive dealing; that with respect to their grievance concerning the relationship between Carvel and its sup-

vel franchise agreements were by concurrent findings of the district court and a unanimous Court of Appeals found reasonable and legally justified (R. *446* to *448*; *R. 47-51*; R. *54-59*).

d. What is presented in this case to serve as the prerequisite "tied" product (or products) represents a fragmentation into its component parts of the unitary finished ice cream sold under the Carvel trademark for the distribution of which, through franchised stores, Carvel exists. A shorthand confirmation of this is the finding in the district court (R. *58*): "The end product which was sold to the public *was Carvel ice cream,* and it was this product to which the Carvel trademark and good will attached" (italics in original). The restrictions of the franchise agreement referring to all those ingredients which are converted into and sold as part of the end product, are not infected with tying characteristics or motivation because, said the district court, they ". . . *are aimed primarily at control of quality and are not part of a design by Carvel to monopolize business in any of these fields.*" (R. *62*); the findings of the Court of Appeals are in accord (R. *453*).

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pliers, they were relying on unlawful kick-backs (*supra*, p. 9), that reliance on the sale of equipment as a tying product in an illicit tying arrangement was an after-thought introduced in their brief after the antitrust trial (*id.*); that their reliance on the Carvel trademark as the basis for a presumption in their favor was evident for the first time in their petition to this Court for a writ of certiorari predicated on the point suggested in the minority opinion below (*id.*); that petitioners' counsel made pre-trial representations to the district court that Carvel does not own patents on a freezer, and that similar and better machines are available (*id.* p. 8); and in addition, Carvel's rights of trademark and copyright were wholly imaginary or fictitious (*id.* p. 8).

Furthermore, the guarantee aspect inherent in sales to the public under a trademark deserve consideration in this connection. Carvel's exposure to liability and injury to its good will, is a realistic confirmation of the need and reasonableness of the restrictions designed to effect quality control over the unitary finished product. The district court concluded that any defects in quality over which there would be no control in the absence of the requirement to use Carvel special formula mix and ingredients in the end product . . . "would detract from the Carvel name and good will . . . . Carvel is not by these restrictions taking any business for itself at expense of its competitors and no injury to competition is shown" (R. *62*).

Exposure to such risks of defect in the Carvel finished product was found by the Court of Appeals to bear upon the propriety of the restrictions (R. *453*). We suggest this is within the rationale of *Pick Manufacturing Co.* v. *General Motors Corp.*, 299 U.S. 3 (1936) *aff'g.* 80 F. 2d 64 (7th Cir. 1935). It is Carvel's responsibility for the purity of the finished product which the dealers put before the public. We are referring to the Purity Pledge (Def. Ex. C-8, R. 425, 3482) which is prominently displayed by the dealers to attract patronage but with the inevitable effect of injury to Carvel's good will and reputation of its business if the Carvel finished ice cream products are found inferior or defective.[32] This is the form of representation to the public in the name of Carvel (*id.*):

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[32] Petitioners argue that Carvel has no need of controlling quality because the dealers under provisions of the franchise agreement carry sizable products liability insurance, and furthermore, because local law and regulations require the dealers to be licensed as retail manufacturers and also designate the proper "contents of ice cream mix by

"*CARVEL*

Purity Pledge

. . . all pure, fresh, laboratory-tested products, manufactured under special formula by sanitary equipment and served in hygienically clean stores. Strict Carvel supervision maintains these high standards for your protection.

YOUR LOCAL CARVEL DEALER."

We have shown in this section that the facts of this case do not display, in purpose, operation or effect, any of the characteristics of a tying arrangement forbidden by the antitrust laws. Indeed, it can as readily (if not more so) be said here, as was said about *Times-Picayune, supra*, in the opinion of this Court in *Northern Pacific*:

> ". . . There was no tying problem at all since only one product was involved and that, in any event the defendant did not possess sufficient economic power in the . . . market to bring [its practices] within the principle of per se unreasonableness" (*supra*, 356 U.S. 1 at 10).

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law" (Their Brief, p. 43). These arguments altogether missed the point of exposure to injury of the good name and reputation of Carvel resulting from lack or ineffectiveness of quality control or the sale of inferior or defective Carvel ice cream products.

II.

It is inappropriate to invoke presumptive economic power based on license of a trademark, nor would it make any difference on the facts in this case so to do; findings by the Court below to this effect are not clearly erroneous.

A. Decisions in Cases Involving Illicit Tying Agreements Where the Tying Product Was Patented or Copyrighted, Were Predicated Not on Presumptive, but on Evidentiary Proof of Sufficient Economic Power.

An agreement under scrutiny for anti-competitive effects may just as readily fall within the ambit of § 3 of the Clayton Act whether the tying product is patented or unpatented. Where a patent is involved the lawfulness of the tying clause ". . . must be ascertained by applying to it the standards prescribed by § 3 as though the leased article or its parts were unpatented." *International Business Machines Corp. v. United States*, 298 U.S. 131 (1936) at 138. The purpose of such language in the Clayton Act was to exclude the possibility of giving a patented article exceptional treatment for which there would be no tenable basis other "than the protection of its good will" where this can be achieved by methods . . . which do not tend to monopoly and are not otherwise unlawful" (*id.* 140). Nor does it matter whether the tying product is or is not copyrighted. The finding of illegality is based on evidence of unlawful use of the copyrighted product and the resultant injury to commerce appraised by the same standards as would apply if the tying article were not copyrighted. *United States v. Paramount Pictures, Inc.*, *supra*, at 144.

This is also evident in *Loew's, supra,* from this Court's exposition and affirmance of the findings in the district court (189 F. Supp. 373).

It appears, then, that the immediate impact of the presumption on the patented or copyrighted product is that the statutorily granted monopoly will not entitle its owner to any special treatment. In that sense, it may be said of all the cases of this character as this Court in *Northern Pac. R. Co.* v. *United States*, 356 U.S. 1 (1958) said of *International Salt, supra* (*id.* at 10), that the tying arrangement was held illegal "despite and not because" of the patent or the copyright.

B. Although It Is Inappropriate Generally to Attribute by Presumption to an Owner of a Trademarked Article Sufficient Economic Power to Restrain Competition, To Do So Would Make no Practical Difference in This Case.

It has never been thought that the existence of a trademark or its licensing, inhibits enforcement of the antitrust laws. This is shown by *Timken Roller Bearing Co.* v. *United States*, 341 U.S. 593 (1951).[38] Despite the important role played in that case by trademarked products, the unlawfulness of the conduct under scrutiny was ascertained without reference to presumptions. In *Timken* there was proof of an agreement to allocate trade in different

[38] Anchor Serum Co. v. FTC, 217 F. 2d 867 (7th Cir. 1954) is similar to *Timken, supra*, in the sense that an attempt was made to use the license of a tradename to cloak activities which were found on the facts to violate § 3 of the Clayton Act. It is of little, if any, persuasive value in the context of this record before the Court because it was found that the exclusive right to the trade name "Anchor" under which a serum was being marketed to wholesalers in veterinary supplies, had been lost to others who had acquired independent rights to it (*supra* at 869).

markets and this was held to be a *per se* violation, this Court saying with relation to the trademark aspect of the case (*supra*, 341 U.S. 593 at 598-599):

> "Furthermore, while a trademark merely affords protection to a name, the agreements in the present case went far beyond protection of the name 'Timken' and provided for control of the manufacture and sale of antifriction bearings whether carrying the mark or not."[34]

Similarly, the use of a secret formula and secret process by a manufacturer of a pharmaceutical product could not serve to shield the owner from the illegal effects of a plan to control the resale price of the finished article after it was sold to a buyer. *Dr. Miles Med. Co.* v. *John D. Park & Sons Co.*, 220 U.S. 373 (1911), 402, 403.

Timken shows that the nature of the transaction and not the existence of a trademark or secret process governed the propriety of applying the *per se* rule. Here, if the license of the Carvel trademark is regarded as the "tying" element which was suggested in the opinion of dissent below (R. *441*), the applicable standard would not be the one customarily applied to *per se* violations. If the Carvel

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[34] See the observation concerning the language in *Timken* quoted in the text in the Report of the Attorney General's National Committee to Study the Antitrust Laws (1955), which after calling attention to the first sentence in the quotation from that decision, said (at p. 87):

> "The Timken case, therefore, does not cast any cloud upon restrictions in trademark licenses as such. This Committee believes that as in the case of patents, valid trademark rights may provide a lawful main purpose to which reasonable restriction on competition may be properly ancillary and therefore legal. We also believe that unpatented inventions, know-how, or other trade secret information may give rise to a lawful purpose to which some restrictions on competition may be reasonably ancillary."

trademark is viewed as attached to a vendable product, that product is the Carvel finished ice cream, with the result that the component parts of that finished product could hardly be treated as "tied" products. Consequently, on this premise the question presented for decision would be the effect of the total requirement and exclusive dealing provisions of the Carvel agreements which apply only to those components which are sold to the public as part of the finished product. Decision of that question would apply not the *per se* rule, but the rule of reason. On the other hand, if it is the trademark license itself which is regarded as the tying element to which the sale of the Carvel components is tied, the question presented for decision would be a tying arrangement which comes within the purview of § 1 of the Sherman Act and not § 3 of the Clayton Act.

Several interesting fact situations bring this point into clearer focus, namely cases where the tying element was not a product. *Columbia Broadcasting System* v. *Amana Refrigeration Inc.*, 295 F. 2d 375 (7th Cir. 1961); *Crawford Transfer Co.* v. *Chrysler Corp.*, 338 F. 2d 934 (6th Cir. 1964); *Brown Shoe Co.* v. *FTC*, 339 F. 2d 45 (8th Cir. 1964). *Amana, supra*, presented for decision the antitrust effect (pleaded in a counterclaim) of a claimed offending condition which was tied to the "sale" of television time (*supra*, 295 F. 2d 375 at 378). It was pointed out that § 3 of the Clayton Act "does not apply to 'tie-ins' involving services" (*id.*). *Crawford, supra*, affirmed judgment of dismissal of a treble damage action tried without a jury. That case involved a compulsory condition on Chrysler dealers to accept a transportation service designated by Chrysler, the cost of which was charged to the purchase price. It was held that Chrysler was not guilty of a tying arrangement

in violation of § 1 of the Sherman Act, 338 F. 2d 934 at 939. The operative exonerating reason was the finding that Chrysler did not seek to invade and dominate the automobile transportation carriers' business. While Chrysler saved millions of dollars by means of this transportation system "it received no direct profits from the transportation carriers" (*id.*). By analogy to the facts and findings in this case, Carvel has no interest in the business carried on by the dairies or suppliers of flavorings.

In *Brown, supra,* the alleged offending conduct consisted of the offer by the seller franchising organization to its shoe dealers of various services beneficial to them on condition, however, that they concentrate upon the promotion of the seller's line of products. The court set aside the order and opinion of the Commission, and in so doing, pointed out a number of considerations that are directly pertinent here, namely: (a) Unlike the situation in the decision in *Northern Pacific, supra,* where it was found that the condition upon which the railroad sold or leased land was of no benefit to the buyer, *Brown* by its condition did offer beneficial services to its dealers which, of course, is in accord with the facts and findings in the instant case; (b) While Brown's services, like the licensing of Carvel's trademarks, were attractive to dealers, Brown like Carvel, had no monopoly or dominant position because dealers could obtain similar services from other shoe distributors, just as Carvel dealers had the opportunity to obtain franchises from competing ice cream chains, or to enter the business of retailing ice cream some other way.

Under these circumstances, the Court in *Brown,* as did the Court of Appeals below, decided that the " . . . fran-

chise stores program was not an unlawful tying arrangement and that there was a complete failure to prove an [unlawful] exclusive dealing agreement . . ." (*supra*, 339 F. 2d 45, at 54, 55, 56).

We respectfully invite attention now to the basis on which the Court of Appeals premised its decision on this aspect of the case:

1. The Court found that no basis existed for curing "the first of the deficiencies in proof as to economic power" by presuming its existence from the licensing of a package of trademarks, design patents, and patented components in a freezer. On the facts, the patented items had no motivating significance in bringing about the licensing agreement. As concerns the licensing of the Carvel trademark, it was possible for a trademark to have such prominence that its license coupled with further condition would be unlawful--"but such a trademark would satisfy the market dominance test of *Times Picayune* and *Northern Pacific.*" The figures show that Carvel is not such a mark" (R. *452*).

2. The second main premise consisted of evaluating the facts in this case in the light of principles reflected by precedents (and distinguishing those not applicable), with the resultant conclusion that the record affords no sufficient basis for upsetting the finding in the district court that Carvel did nothing more than adopt proper means for assuring compliance with its standards which the protection of its good will justified (R. *453*).

3. The final premise for the decision of the court below consisted of an analysis of the evidence in the record dealing with the nature and amount of commerce involved (R.

451-452). The thrust of this analysis was to show that even if "the first of the deficiencies in proof as to economic power" were remedied by resorting to presumption, additional deficiencies in petitioners' proof would still remain uncured for lack of evidence to show the requisite adverse effect upon commerce. The figures cited by the Court, apparently drawn from plaintiffs' Exhibit 24 (R. 113, 3245),[35] showed that in the tri-state area of New York, Connecticut, and Massachusetts, Carvel dealers aggregating 250 out of a total of 125,000 outlets selling ice cream cones amounted to "one-fifth of one percent of the outlets and apparently to about one per cent of the business"; that the balance of the Carvel stores were found principally in two other states, New Jersey and Pennsylvania, and the rest scattered through a number of other states (R. *451*). Furthermore, while Carvel's aggregate sales were "not insubstantial," the court concluded that "the total sheds no light on the amount of 'tied' sales here complained of, which common sense tells us must be a minor part" (*id.*).

Further analysis by the court revealed the "insubstantiality" of the commerce affected (*id.*). The sales of all ingredients, excluding mix, averaged less than $3,400 per dealer per year, and even so, "the record does not make it clear whether all these 'ingredients' were tied" (*id.* fn. 2). In the light of these facts, the court concluded that the amount of commerce was "not consequential" and that money damage to petitioners "was even less so" (R. *451*). With relation to ice cream cones "whose tie-in was hard-

[35] Other statistical data showing Carvel's share of the market in the principal ingredient, namely, mix, is found in Def. Ex. C-9 (R. 315, 3490), Def. Ex. C-11 (R. 315, 3500), and Def. Ex. C-12 (R. 318, 3501).

est to justify in terms of quality control," the purchases averaged $460 per dealer per year (R. *451*). Carvel's mark-up, shown by the figures to be about 5% or about $25. per dealer, resulted in trivial damage to petitioners, if any, "since the price Carvel charged them was less than they could have obtained if they bought in smaller quantities than Carvel . . ." (R. *452*).

Finally, the court below inferred that it was the triviality of whatever financial hardships the plaintiffs may have suffered that accounted for their willingness " . . . to limit themselves to *per se* violations rather than incur the expense of assembling market data to gain what at best would be a negligible recovery" (R. *455*).

In the perspective of these factual findings on the evidence (which are, of course, entirely confirmatory of similar fact evaluation by the district court), it becomes clear that reliance on a presumption based on licensing of the trademark would operate only partially to diminish petitioner's burden of proof regarding existence of sufficient economic power. It would leave undiminished the burden to prove the forbidden injury to commerce. The demonstrated paucity of petitioner's evidence in such other vital respects, leads inevitably to the conclusion that petitioners did not and could not show clear error in the decisions below.

C. Neither Precedent Nor Trade Usage Suggests the Propriety or Necessity for the Innovation in Antitrust Law of Presuming Sufficient Economic Power to Restrain Commerce from the License of a Trademark.

Unlike the proprietor of a patent invention, the owner of a trademark may not make a negative or merely prohibitive

use of it as a monopoly. It is settled doctrine that a trademark confers no monopoly as that term is known in patent and copyright law. The trademark is merely a commercial signature which identifies the goods sold under it to the public and facilitates the protection of good will. *United Drug Co.* v. *Rectanus Co.*, 248 U.S. 90, 97-98 (1918). The same trademark may be used by different owners on products not competing with each other as shown by *American Steel Foundries* v. *Robertson*, 269 U.S. 372, 380 (1926) which confirms that even the exclusivity of the rights granted by trademark are special and limited. In the sense that a trademark goes along with a business, the rights of trademark have wide latitude. *Menendez* v. *Holt*, 128 U.S. 514 (1888). That decision affirmed grant of an injunction restraining infringement of "La Favorita", a trademark upon a brand of flour. Holt & Company were not the actual manufacturers of the flour, a circumstance which "does not deprive them of the right to be protected in the use of that brand as a trademark" (at 520). It was a symbol which gave evidence of the skill, knowledge and judgment of the owners, certifying to the merit and uniformity of the finished product. The infringement which was enjoined was an injury to good will, defined long ago (in terms still meaningful today), as "nothing more than the probability that the old customers will resort to the old place" (*id* at 522).

While statutory benefits of registration under the Lanham Act are important, the basic rights of trademark are not statutorily granted but are part of the common law of unfair competition. Accordingly, even an unregistered mark applied to goods which are manufactured for its owner, is enforceable. It is sufficient if the goods "passed

through his hands in the course of trade and that he gives to them the benefits of his name and business style" *E. F. Prichard Co.* v. *Consumers Brewing Co.*, 136 F. 2d 512 (6th Cir. 1943) at 519, *cert. denied*, 321 U.S. 763.

A fairly recent decision by the United States Court of Appeals for the Second Circuit, *Dawn Donut Company* v. *Hart's Food Stores, Inc.*, 267 F. 2d 358 (2d Cir. 1959), had occasion to apply several principles of trademark law pertinent to this case. The case involved the scope of protection available to the owner of a trademark, used in the distribution of doughnut mix to bakers in various states who upon converting ", sold the finished baked items under the trademark. The mark was registered under the Lanham Act which gives nation-wide protection. It was held, however, that the rights to enforce the trademark could be lost temporarily for failure to use it in a particular area, where the defendant, without intention to infringe, used a similar mark in due course of business. The Court, while confirming that the mark could be used by a "related company" [Which by definition would include the Carvel respondent companies using trademarks owned by the person (Thomas Carvel) who controls them], stressed the affirmative duty upon the licensor to exercise "supervision and control over the operations of its licensees" lest the public be unwittingly deceived (*id.* at 367).

Petitioners' contention that the Carvel corporations did not by use of the Carvel trademarks acquire any good will to protect, is without merit; their use by the several Carvel corporations was certainly authorized by Thomas Carvel, and an oral license is sufficient. *Belden* v. *Zophar Mills*,

34 F. 2d 125 (2d Cir. 1929).[36] Nor have the Carvel trademarks suffered impairment through their use by the Carvel corporations, as licensor, to franchise the Carvel dealers. See Lanham Act, 15 USCA § 1055, also *Keebler Weyl Baking Co.* v. *J. S. Ivins' Son*, 7 F. Supp. 211 (E.D. Pa. 1934).

The insufficiency of the proof of actual inadequate inspection and supervision by the trademark owner of its licensees, led the court, in *Dawn*, to affirm the denial by the district court of an injunction, *supra*, at 368. The mere provision in the contract with franchisees who purchased the mix to use it "as directed and without adulteration" was found defective because they "failed to provide for any system of inspection and good will" by reason of which " . . . plaintiff could not know whether these bakers were adhering to its standards in using the mix . . . " (*id.*);[37] for another example of the loss of the rights of trademark through omission in the licensing agreement to

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[36] Petitioners in their brief mistakenly challenge the right of Carvel respondents as licensors to license use of the Carvel trademarks (Their Brief, 39-40; compare R. 201, 207). Petitioners' counsel during the antitrust trial offered, and the trial judge read into the record made by Carvel in a pleading in another case to this effect (R. 207):

> "The public has come to associate and identify the defendant's trade-marked products and trade name with the defendants' patented design building, custom-built equipment, signs and insignia and special business techniques."

[37] The court's further remark in this connection is instructive in this case (in *Dawn Donut id.* at 369):

> "Thus I do not believe that we can fairly determine on this record whether plaintiff subjected its licensees to periodic and thorough inspections by trained personnel or whether its policing consisted only of chance, cursory examinations of licensees' operations by technically untrained salesmen. The latter system of inspection hardly constitutes a sufficient program of supervision to satisfy the requirements of the Act."

provide fixed standards for the licensee to follow, see *Braig* v. *Ductraine*, 319 Mass. 711 (1946).

Thus, these various and variable rights of trademark differ in many respects from the definite monopoly granted with respect to specific products by the laws of patent and copyright. What the owner of a trademark acquires by statutory registration, is rather a group of privileges, identifying a method or style of conducting business which may apply to many products, sometimes to their components without reference to the finished products, and sometimes to the finished products without reference to their components—but in all events, requiring for their continued unimpaired enforceability, the discharge in a realistic way of inspection and supervision. The scope and purpose of the supervision in relationship to justifiable steps for the protection of the good will of the business in which the trademark is used, will be mentioned later. Here, it is pertinent to show in the light of the cases discussed above that a presumption of an economic power to restrain trade in an antitrust sense would frequently, if not normally, embrace an entire business or substantial segment of it. To introduce such a presumption would represent an innovation in antitrust law which would confuse rather than facilitate evaluation of alleged antitrust implications in the use of the trademark. No such presumption has been found necessary in the past, nor is it necessary now because, as *Timken, supra,* points out, evidence of the misuse of a trademark may serve to highlight a plan to flout the Sherman or the Clayton Acts.

While the suggested presumption might provide a weak and superfluous evidentiary tool in antitrust matters, it would, more probably, serve to stigmatize broad areas of

business. Aside from limited and special situations where the presumption would not be necessary, the licensed trademark operates in aid of, and not as a restraint upon, competition. "Trade-marks, indeed, are the essence of competition, because they make possible a choice between competing articles by enabling the user to distinguish one from the other. Trade-marks encourage the maintenance of quality by securing to the producer the benefit of the good reputation which excellence creates." H. Rep. No. 944, 76th Cong. 1st Sess. 2-3 (1939). An apt illustration is found in *Drop Dead Co.* v. *S. C. Johnson & Son, Inc.*, 326 F. 2d 87, 96 (9th Cir. 1963), *cert. den.* 377 U.S. 907 (1964) where a defendant, answering allegations of trademark infringement, set up antitrust violation in defense. This was founded on registration of multiple marks by a large company which spent twelve million dollars in advertising the single trademarked product and showed fifty million dollars from its sales in a period of five years. The court in affirming the judgment of permanent injunction below, declined to infer breach of the antitrust laws saying, that the promotional and competitive use of the trademark "constitute the sort of aggressive competition and promotion that antitrust laws seek to protect."

The economics of trademark licensing cannot be assumed to be so infected with anti-competitive purpose and effect as to justify a presumption that the licensor has acquired sufficient economic power immediately or prospectively unlawfully to restrain competition in the trademarked product, or other article. The case last referred to illustrates, of course, that big business makes use of trademark licensing. The practice, however, is just as much, if not more, prevalent in small business, particularly food items. The

owner of a trademark with limited capital, as in the case of Carvel, is very often enabled to distribute a quality product in competition with very well established corporations in the field by means of licensing. The ability to do so gives impetus to develop marks of quality. The licensing of trademarks fosters dispersion of managerial and technical know-how, which makes it possible for the licensees to enter fields of business which they would not otherwise be able to do. The licensees, like the Carvel dealers, are able to "cash in" at once on the built up consumer acceptance of the trademark and the product; they also reap the benefit of their licensor's research, promotion and advertising which they could individually neither afford nor contemplate. Therefore, it would not be fair to infer by presumption that a trademark license always and necessarily provides indicia of antitrust infractions. Cf. *United States v. E. I. Du Pont De Nemours & Co.*, 351 U.S. 377, 393 (1956).

We respectfully invite judicial notice [see *Tampa Electric Co. v. Nashville Coal Co.*, 365 U.S. 320, 332 (1961); *Parker v. Brown*, 317 U.S. 341, 363 (1943)], of our tabulation (Appendix "B" to this brief) based on data published in the Official Gazette of the Patent Office showing a plethora of registered trademarks by owners in New York, New Jersey, Massachusetts, Pennsylvania and Connecticut, which are used in the sale and distribution of ice cream products. This data (which does not include the Carvel trademarks), reveals the presence of the very largest[38] as well as the little

[38] Appendix "B" to this brief shows the presence in the field of trademarked ice cream products of such giant firms as General Foods Corp., National Dairy Products Corp., The Borden Co., General Baking Co., Good Humor Corporation, Standard Brands Inc., Foremost Dairies,

or unknown firms who utilize trademarks in the ice cream business in competition with Carvel and its dealers in the aforementioned five states.

III.

Carvel's procedures under provisions in the franchise agreement, to assure quality control and uniformity of the ice cream sold under the Carvel trademarks, are economically justified as measures to protect good will and to safeguard the trademarks; the concurrent findings of the courts below to this effect are not clearly erroneous.

A. The Uniformity, Quality and Product Integrity of the Carvel Ice Cream Are Maintainable through Carvel's Secret Formula Processes and Specifications.

The findings in the courts below confirm the existence and use of the Carvel special formula mix and other essential ingredients which comprise the final product (R. *438, 449, 453; 48*). This is supported by evidence in the record which is not contradicted. Thus, not only the Carvel mix but the syrups, toppings and flavorings are made up for Carvel to its special formulas and specifications (R. 197, 198, 199). The secrecy of the formulas and specifications are preserved and such products are not available in the general market among the vendors of such supplies (R. 200, 203). The fact that others make and sell ice cream ingredients for the making of ice cream of good quality does

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Inc. and Hershey Creamery Co. In addition, are such far-flung chain stores as The Great Atlantic & Pacific Tea Co., Inc., Acme Markets, Inc., First National Stores, Inc., Food Fair Stores, Inc. and The Grand Union Company.

not alter the fact that the Carvel ingredients are made by secret formula. Nor does the availability even of comparable goods make any difference because it may not be assumed that they may be used interchangeably. Other products though "just as good," perhaps, may produce a bad product, since the Carvel components are geared to assure the compatability of each ingredient with the mix and the dispensing machine. This assures uniformity and quality of the end product (R. 197-198). Even the cones are governed by specifications of design, precise measurement as to height and diameter and the manufacturer is obligated under the supply contract to make cones to these specifications "only for Carvel and for no other person" (Pl. Ex. 11, R. 264, 265, 3187).

In considering the justification for procedures to protect good will, it becomes relevant to consider the legal status of trade secrets. The rights of ownership in trade secrets are not in the nature of "property". Nor are they conferred by statute as in the case of patents, copyrights or trademarks. Yet, the federal courts enforce their exclusivity and confidentiality by injunction and damages. *E. I. Du Pont de Nemours Powder Co.* v. *Masland*, 244 U.S. 100 (1917); *Franke* v. *Wiltschek*, 209 F. 2d 493, 493-498 (2d Cir. 1953); *Vitro Corporation of America* v. *Hall Chemical Co.*, 254 F. 2d 787 (6th Cir. 1958); *Minnesota Mining & Mfg. Co.* v. *Technical Tape Corp.*, 23 Misc. 2d 671 (Sp. Term We. Co. 1959), aff'd 226 N.Y.S. 2d 1021 (1962). A brief summary of the decisions will suffice for the limited purpose at hand.

The right of secrecy is protected not on the theory of reward for the inventor, but to protect him against loss

from a breach of faith. *Franke* v. *Wiltschek, supra.* The secret need not amount to an invention. Nor does it make any difference that it may be discoverable by independent experimentation. Its value and privacy are recognized as long as a substantial portion of the secret is preserved. A disclosure to employees or by contract to facilitate conduct of business with its use does not result in its dissipation. A trade secret consists of any formula, pattern or device, process of manufacturing, treating or preserving materials, which is used in one's business and gives the owner competitive advantage over those who do not know it and those not entitled to use it. More elaborate definitions are found in Restatement of Torts, Section 757. The cases which we have cited refer to numerous applications of what is stated here in a great variety of contexts. What is significant is that Carvel devised and now uses secret formulas, processes and specifications which have become commercially valuable.

The purpose of having trade secrets in business, and taking elaborate precautions in contractual arrangements with suppliers to preserve them, is lawful. Inasmuch as Carvel is also the licensor of trademarks under which finished products incorporating components are made by secret formula, it is in the position all the better faithfully to discharge the affirmative legal duties resting upon a trademark owner. *Dawn Donut Co.* v. *Hart's Food Stores, Inc.*, 267 F. 2d 358 (2d Cir. 1959). These affirmative duties as *Dawn Donut* points out consist of more than inspection and supervision of licensees. The trademark licensor must be careful to provide in the contract with licensees specific directions to assure product integrity, and standards of uniformity and quality control. Yet, this is precisely the

nature of the provisions in Carvel's agr nents with its suppliers and in the franchise agreements upon which petitioners predicate their claims of *per se* violations of the Sherman and Clayton Acts. This highlights the defects in their original conception of the burden of this case and the nature of the evidence which they would have to produce. It also demonstrates the untenable nature of their position that the decisions of the courts below can be found clearly erroneous.

B. Carvel's Measures by Contractual Provisions and Conduct thereunder to Maintain Ingredient and Product Integrity Were Well Within What Trademark Law Expected and Authorized a Licensor To Do.

There is nothing at all in the record to show, or from which it may be fairly inferred, that Carvel's agreements and conduct went beyond the limits of what Carvel as the owner of a trademark and secret processes was entitled or authorized to do for the protection of the marks, the secret formulas, the products and the good will of the business. The Court of Appeals below, (per Chief Judge Lumbard, writing on this aspect as on every other aspect, except "tying", for a unanimous court), found on the facts and concluded on the law by application of standards established in prior decisions of this Court, that the Carvel franchise agreements and contracts with its suppliers were not unreasonable, that they were motivated by lawful purpose and withstood attack on their legality. In the absence of convincing proof of predatory purpose in the licensing of trademarks as illustrated, for instance, by *Timken*, *supra*, and *Anchor*, *supra*, the Carvel agreements

and system of doing business fell within the obligatory and permissive scope of what a licensor may lawfully do.

In view of the trademark cases previously cited and discussed, it seems necessary now merely to refer, without discussing, to the trademark and the trademark licensing cases found in the opinion of the Court of Appeals (R. *448*) and in the opinion of the District Court (R. *50*); and to a number of decisions sanctioning control of ingredients. Perhaps the best known cases validating, under trademark law, the right of a licensor to control by elaborate contractual regulation and inspection, procedures of the manner for using the chief ingredients and the production of the entire finished product, are the *Coca-Cola* cases.[39]

The *Coca-Cola* decision in *Butler* (cited in the footnote) illustrates far more detailed regulations and supervision than Carvel attempted on the theory that the finished product was unitary in nature. The purpose was to insure wholesomeness and uniformity of quality of the trademarked beverage made by secret formula.[40]

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[39] Coca-Cola Co. v. Bennett, 238 Fed. 513 (8th Cir. 1916); The Coca-Cola Bottling Co. v. The Coca-Cola Co., 269 Fed. 796 (D. Del. 1920); Coca-Cola v. J. G. Butler & Sons, 229 Fed. 224 (E. D. Ark. 1916).

[40] The licensor set the standards for the product which was to be bottled. All plants were subjected to a system of inspection and supervision to insure a sanitary and wholesome product. Inspectors, who were required to make reports, also took samples of the product both before and after the syrup had been mixed with the carbonated water. The inspectors were equipped with gas test gauges, hydrometers, and other instruments to enable them to determine whether or not the product was being put up in accordance with instructions. Other instruments were used to test each machine used by the bottler to determine whether the machine was throwing the right amount of syrup into each bottle. The samples taken were chemically examined, and

Similar approval of ingredient control techniques, in degree dependent upon the nature of the ingredients and finished article, are found in other cases.[41] The only question remaining now on this aspect of the case is whether it is really necessary for Carvel to abandon its system of quality control, and as petitioners urge (Their Brief, p. 45), to divulge the Carvel secret specifications and standards to any supplier with whom a licensee wishes to deal. We submit this approach has no validity in antitrust law and further that on the facts in the record, petitioners' suggestion is absurd.

C. On the Evidence in this Case, Disclosure of Formulas, Specifications and Standards for Those Essential Ingredients Which Are a Part of the End Product Sold to the Public Would Make Control of Quality and Uniformity Financially Unfeasible, Ineffectual as a Practical Matter, and Would Damage Carvel's Trademarks and Good Will; the Concurrent Findings by the Court of Appeals and the District Court to this Effect are Not Clearly Erroneous.

The Court of Appeals in affirming the District Court found no sufficient basis for upsetting the finding below that it "would impose an impractical and unreasonable burden of formulation . . ." to require Carvel to limit itself to

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any necessary change were prescribed. If necessary, the chemical expert and a member of the advisory board were sent to make personal investigations. The water was chemically tested, the sanitation of the plant inspected, and the amount of carbonic acid gas being used checked.

[41] Ralston Purina Co. v. Saniwax Paper Co., 26 F. 2d 941 (W. D. Mich. 1928) (flour); Crown Fabrics Corp. v. American Viscose Corp., 145 F. 2d 246 (3d Cir. 1944) (rayon yarn); H. Freeman & Son, Inc. v. F. C. Huyck & Son, Inc., 7 F. Supp. 971 (N. D. N. Y. 1934) (wooden cloth); B. B. & R. Knight, Inc. v. W. L. Milner & Co., 283 Fed. 816 (N. D. Ohio 1922) (cotton piece goods).

advanced specifications of standards "... for all the various types of accessory products *used in connection with the mix* ..." (R. *453*). On this point, Chief Judge Lumbard dissents; he states "that the Carvel trademark presumptively generates sufficient economic power" (R. *442*), to make out a *prima facie* case (in his view) of illegal tying, albeit, rebuttable by Carvel. The evidence in rebuttal would have to be:

> "... proof that the specifications for products to substitute for those offered by Carvel would be so complex and detailed as to make it impracticable for Carvel to establish such specifications" (R. *444*).

He then cites *Engbrecht* v. *Dairy Queen Co.*, 203 F. Supp. 714 (D. Kan. 1962) which dismissed an action by a group of franchise dealers for a declatory judgment to establish that their franchise agreement was invalid because of violation of the antitrust laws. That case, while involving a similar product, distributed through a franchise system, differs from the instant case in material respects. The opinion refers to the filing of a pre-trial order whereby "this court has held *the mix is not a secret formula*", and indeed more than one mix was available to the dealers there (*supra*, 203 F. Supp. 714 at 717). There is nothing in the opinion which indicates that other essential ingredients were made by special formula. Nevertheless, Chief Judge Lumbard felt that *Engbrecht*:

> "... negates the proposition that it is logical and reasonable to infer—in the absence of proof more compelling than the mere self-serving statement of Carvel's own general manager—that it was reasonable and necessary for Carvel to embody a tying arrangement into its franchise agreement. *Dairy*

> *Queen* poses in striking contrast the insufficiency of the evidence adduced by Carvel to support its claim" (R. *445*).

By this *non sequitur*, due to the differences in essential materials and nature of the two businesses, Chief Judge Lumbard reached the crux of his dissent by stating (R. *446*):

> "I would think it best to remand the cause to the district court for a further hearing *limited to the issue of justification.* If Carvel could establish its claim the result ultimately would be the same. If Carvel were unable to do so the plaintiffs would have sufficiently established all the elements of an unlawful tying arrangement."

Judge Friendly writing for the majority, disagreed with and cogently refuted each point made in the dissenting opinion. We submit that there is substantial evidence in the record to support the concurrent findings; indeed the circumstances and evidence give no support to the views and inferences found in the minority opinion.

The *Dairy Queen* business in *Engbrecht* which operates a nation-wide chain of "some 3400 soft ice cream franchise stores" is "*not* quite similar to Carvel" (R. *445*) as the dissent assumes,—not only because of the vast difference in the number of stores and their geographic distribution on a nation-wide basis, but because mix, the chief ingredient, and perhaps the other ingredients as well, were not made in accordance with secret formulas. This is pointed out in the opinion of the Court of Appeals to support the inference that in *Engbrecht*, the franchising organization "*is satisfied with less exacting provisions*" (R. *454*).

Another statement in the dissenting opinion has tenuous, if any, support in the record, i.e.: ". . . the absence of proof more compelling than the mere self-serving statement of Carvel's own manager—that it was reasonable and necessary for Carvel to embody a tying arrangement into its franchise agreement" (R. *445*). This is characterization not borne out by the record. The witness, Vettel, was not testifying about embodying a tying arrangement. In this connection, it is important to note that the only Carvel dealer who testified at the antitrust trial was one of the petitioners, *Modick*, on a different question; that none of the other petitioners testified, and that plaintiffs did not call a single witness in their behalf to testify about ice cream supplies, whether they were mix, flavors or anything else, nor about uniformity or quality control. This was *their* choice. Whatever were the reasons which prompted petitioners to limit themselves to proof of *per se* violations of the antitrust law only by documentary evidence, the reasons were *theirs*. The point is that Carvel and the other respondents had a perfect right to rely, as all of them did, on petitioners' stipulation. The trial judge had occasion during the trial to point out to petitioners' counsel that they could have called any witnesses they pleased to prove their case:

> "The Court: You could have produced all the live witnesses you wanted. You, yourself said that was all the evidence you were going to put in."[42]

Under these circumstances, there was no proof whatever which made it incumbent upon Carvel to go forward and produce detailed evidence about economic justification for

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[42] This is at numbered page 3676 in the transcript of the trial brought to the Court.

not supplying or publishing specifications for its secret formula and standards. Vettel's testimony on the point of justification was actually elicited on *cross-examination* by petitioners' counsel, who did not avail himself of the opportunity for rebuttal. This leaves Vettel's testimony undisputed and uncontradicted. Isolated from surrounding circumstances, testimony by an employee favoring the side of his employer might be termed "self-serving". However, in the context of the surrounding circumstances when it is realized that petitioners' counsel, after eliciting the testimony on cross-examination, allowed it to remain unchallenged, the characterization "self-serving" loses validity. An important part of the testimony given by Vettel on cross-examination by petitioners' counsel on the subject of quality, standards and supervision, appears in the following excerpts:

> "Q. [*By Petitioners' Counsel*] Carvel contracts with suppliers other than mix suppliers to furnish to Carvel various ingredients and products that are used in the operation of the business; is that not so?
>
> "A. Yes, we do.
>
> "Q. And Carvel exacts from these suppliers a certain standard of quality?
>
> "A. We specify the standard of quality.
>
> "Q. Yes. Is that true with respect to every product that Carvel purchases or has produced by other suppliers for use in the Carvel stores?
>
> "A. Yes, I believe it is.
>
> "Q. And with respect to the standards that you specify, are they any different than the suppliers (*sic*, supplies) made by such suppliers for the non-Carvel trade?
>
> "A. Yes, they are.

"Q. This is to your knowledge?
"A. Yes, sir" (R. 203).

* * * * * *

"Q. [*By Petitioners' Counsel*] In any case, with reference to flavorings or toppings do you ever advise the store dealer of the Carvel specifications for these products?
"A. No, we do not.

"Q. Have you ever advised the Carvel store dealer that he can purchase those products from non-Carvel sources providing they meet Carvel specifications?
"A. No, we have not.

"Q. It is a fact, is it not, that Carvel does not permit that?
"A. *We don't permit it because it would be impossible to police it, impossible to control it, it would be impossible in any way to determine whether each of the hundreds of dealers were following those specifications*" (R. *41*).

The secrecy and difference of Carvel's special formulas which apply not only to mix but to all the essential ingredients of the end product were not in any way challenged by petitioners. Therefore it was unnecessary for Carvel to undertake to prove the injury to the business and its good will and prejudice to its rights in the secret processes which would result from making them available to any supplier in the market from whom a dealer happened to desire to make a purchase. Such widespread dissemination of standards and secret formulas would sooner than later lead to Carvel's loss of any exclusive rights to them. Exactly this kind of publicization of the confidential standards is what petitioners' counsel urge (Their Brief, p. 45). It is a procedure which we say in all fairness we do not

believe was contemplated by Chief Judge Lumbard in his dissent.

Carvel was not called upon to produce evidence of the harmful results from exposure of the private formulas and standards, when they were not challenged by petitioners. Nor was there any occasion to produce further testimony to embellish what Vettel stated on cross-examination, namely, that the disclosure of the standards would make it impossible to control or police the uniformity and quality either of the ingredients or the end products ". . . it would be impossible in any way to determine whether each of the hundreds of dealers were following those specifications" (R. 41).

Further proof in the record on this question demonstrates that certain products used in the preparation of Carvel's special formula fruit flavorings are specified by Carvel to be purchased at crop site (R. 197), a matter of which the Court of Appeals took note (R. *454*, fn. 4). The uniformity and quality achieved thereby in the purees and extracts made from these items is not a matter of fancy, but is required by the fact that an inferior ice cream product can result if non-conforming puree or extract is used to flavor it (R. 197-199). These ingredients specifications are related to wholesomeness of the finished product as well as to its taste and general quality (R. 198).

The burden which would be placed upon Carvel to ascertain that its specifications were being met is highlighted by the fact that Carvel's standards specified to its suppliers are different than those used by the suppliers for their non-Carvel trade. Accordingly, it would be incumbent upon Carvel to ascertain whether, in each instance, the supplier

chosen by any of 400 dealers to provide products conforming to these specifications, had purchased items with sufficiently similar qualities and compatibility with the other end product ingredients and had processed them correctly.

Another alternative open to Carvel would be the constant sampling and testing of flavorings purchased by each of the stores from the various sources they might have chosen.

To state these propositions is to make clear that the obligations they impose are impractical, would be highly burdensome and would require heavy expenditures of both manpower and capital, thus increasing what now are generally prices less than those prevailing in the trade for similar items.

It was in this connection, and recognizing the difficulties which both Carvel and the dealers would experience, that the Court below observed that cases where the formulation of specifications might be feasible were (R. *453*):

> " . . . scarcely relevant to the problem of controlling something so insusceptible of precise verbalization as the desired texture and taste of an ice cream cone or sundae; that Carvel was able to specify this to its source of supply, whose product it regularly checked, does not show that administration could be confided to 400 dealers."

The same may be said to even greater purpose on the question of Carvel's publication of specifications for its secret formula mix. Statistics in the record demonstrate that in the five state area during 1959 some 222,465,000 gallons of frozen desserts were produced (Def. Ex.

C-11). Ordinary experience supplemented by the contents of our Appendix "B", tells us that literally hundreds of dairies must be engaged in the manufacture of this quantity of mix in the region. If petitioners' argument were to prevail, Carvel would be compelled to verify and assure its standards of quality, uniformity and wholesomeness by repeated checks upon the output of as many of those plants with which its dealers might choose to deal. We have already shown that the ingredients permissible by federal standards for inclusion in ice cream mix allow wide latitude to a manufacturer of mix in selecting the sources of the various ingredients to be included therein (*supra*, at p. 20). Within these categories there exist products of varying source and quality. Manifestly, then, dairies called upon by one or several dealers to manufacture mix for their use to Carvel specifications would not find it economical to prepare a special mix sporadically for a few retailer customers, or to submit to the rigid conditions of supervision and preservation of the secrecy of the formula (R. 181, 182, 190, 191).

Under such circumstances it is evident that Carvel would be obligated to insure conformity with its standards as a practical matter by repeating in the case of many dairies, the same process by which it now controls the quality of its mix now made by a small number. We are referring to the requirement that dairies furnish reports as to each batch of mix within 24 hours of its manufacture with the final laboratory test of the product, the packaging and labeling of the mix; securing delivery of this perishable commodity; delivery by Carvel of its secret formula stabilizer-emulsifier, etc. (Pl. Ex. 10, R. 252-261, 3186; Pl. Ex. 15, R. 337, 338-339, 345, 3205; R. 196). The difficul-

tie under such conditions to maintain the secrecy of the formula are too great to be considered practical or feasible.

The commercial impossibility of the result for which petitioners contend brings to mind the observation of another court in a related context, that: " . . . the anti-trust laws do not require a business to cut its own throat." *Dehydrating Process Co.* v. *A. O. Smith Corp.*, 292 F. 2d 653, 657 (1st Cir. 1961).

In this light, we say the Court of Appeals, far from being clearly erroneous, was eminently right to distinguish machinery or equipment cases where publication of specifications could serve to protect a vendor's good will and responsively answer the contention that a tying requirement is necessary for the purpose (R. *453*).

On this aspect of the case we invite consideration to analogous circumstances in *United States* v. *Bausch & Lomb Optical Co.*, 321 U.S. 707 (1943). In that case, *Bausch & Lomb* made pink tinted optical lenses exclusively for Soft-Lite, which distributed them through a network of franchised wholesalers and franchised retailers. Soft-Lite appealed from a decree adjudging its pricing policies illegal. Soft-Lite sold one-third of the pink tinted lenses for one-half of the gross receipts derived in the United States by everybody engaged in the sale of such lenses (321 U.S. at 710). Soft-Lite distributed under a trade-mark, but no patents *or secret processes* were involved (*id.*). The government cross-appealed to obtain an expansion of the decree, and it is this feature of the case which is pertinent here. The opinion of this Court stated (*id.* at 728):

> "Specifically, we are asked to direct the inclusion of requirements that Soft-Lite file 'with the district court a written instrument providing that it will sell its product, without discrimination, to any person offering to pay cash therefor' ".

This specific request of the Government was rejected as contrary to the intentions of Congress even with respect to someone who had violated the law. This Court said:

> "But in no instance has it [Congress] indicated an intention to interfere with ordinary commercial practices. In a business, such as Soft-Lite, which deals in a specialty of a luxury or near-luxury character, the right to select its customers may well be the most essential factor in the maintenance of the highest standards of service" (*id.*).

In the Carvel business the dealer is important but the trademark and good will of the enterprise is at his mercy if he is free to experiment let alone tamper with the product. Product integrity, correspondingly, is of great importance to the dealer's welfare. It is for the benefit of all the franchised dealers as well as the franchising organization that quality control should remain in the hands of the licensor—where it belongs, by law and common sense.

We submit on behalf of Carvel in the context of concurrent findings by two courts below dismissing charges of unlawfulness levelled by petitioners that to compel Carvel to publish its formulas and specifications, which in this case are trade secrets, would be unprecedented, not supported by any authority which has been called to our attention or of which we are aware, and would represent an unwarranted interference with a lawful distribution system of a high quality trademarked product. We submit

further that the courts below far from being clearly in error were entirely correct on the facts to find that Carvel has adequately proven its justification for invoking, and by supervision, enforcing conditions for control of quality and uniformity of the products under its trademark, and that its true purpose thereby was the protection of the trademarks and good will of the business within the meaning of the statement found in *United States* v. *Standard Oil Co.*, 337 U.S. 293 (1949):

> "The only situation, indeed, in which the protection of good will may necessitate the use of tying clauses is where specifications for a substitute would be so detailed that they could not practicably be supplied" (*id.* at 306).

IV.

The Courts below correctly found and decided that neither the Carvel agreements with its suppliers nor its total requirements and exclusive dealing agreements with its franchised dealers were illegal under the Sherman or Clayton Acts.

A. The Carvel Franchise Agreements with Its Dealers Were Correctly Found Not to Embody Violations of the Antitrust Laws.

Petitioners at the trial, before the Court of Appeals and in this Court rely on *per se* unlawfulness of the franchise agreement. Concurrent findings reject their contention and more than that, uphold the legality of the total requirement and exclusive dealing provisions. They were found to be economically justified, and responsive also to the quality control and supervision of dealers, as required and sanctioned by the law of trademarks (R. *447, 448; 49, 50*). These

conclusions are supported by the entire record; it is abundantly clear that no clear error has or can be shown.

Petitioners failed to produce economic evidence of any kind. They rested from start to finish on the doctrine of unlawfulness *per se*.

(1) It seems clear that total requirement agreements are examined as to whether they effect an unreasonable restraint on commerce under standards summarized in *Tampa Electric Co.* v. *Nashville Coal Co.*, 365 U.S. 320 (1960); to the same effect are *Lawlor* v. *National Screen Service Corp.*, 352 U.S. 992 (1957), *aff'g.* 238 F. 2d 59 (3d Cir. 1956), and *FTC* v. *Sinclair Co.*, 261 U.S. 463 (1922).

(2) The lawfulness of exclusive dealing provisions as reflected in the Carvel franchise agreements is ascertained not by the *per se* rule but under the standards of reasonableness. *Tampa, supra*; *Pick Manufacturing Co.* v. *General Motors Corp.*, 299 U.S. 3 (1936) affirming 80 F. 2d 641 (7th Cir. 1935); *Bascom Launder Corp.* v. *Telecoin Corp.*, 204 F. 2d 331 (2d Cir. 1953), *cert. den.* 345 U.S. 994; *Boro Hall Corporation* v. *General Motors Corporation*, 124 F. 2d 822, (2d Cir. 1942); *Packard Motor Car Co.* v. *Webster Motor Car Co.*, 135 F. Supp. 4 (D. Col.) *rev'd.* (4th Cir.), 343 F. 2d 418, 420, 421, *cert. den.* 355 U.S. 822 (1957); *Schwing Motor Co.* v. *Hudson Sales Co.*, 138 F. Supp. 899 (D. Md.) aff'd. *per curiam* 239 F. 2d 176 (4th Cir. 1956), *cert. den.* 355 U.S. 823 (1957); and *Hudson Sales Corp.* v. *Waldrip*, 211 F. 2d 268 (5th Cir. 1954), *cert. den.* 348 U.S. 821.

It has been pointed out that restraints applicable to a relatively minor brand in a competitive market of a general commodity are not encroachments upon the antitrust stat-

utes at all. *Tampa Electric, supra; Packard Motor Car Co., supra; Schwing Motor Co., supra; Reliable Volkswagon, supra; Arthur* v. *Kraft-Phenix Cheese Corp.*, 26 F. Supp. 824 at 827, 829 (D. Md. 1937).

3. Other Carvel dealer agreements ancillary to the franchise agreements are also not unlawful.

The remaining agreements which the dealer signs at the time he acquires his franchise are essentially supplementary to the franchise agreement. Thus, the "Signs and Special Equipment Lease" gives the dealer the right to use certain unique Carvel signs and the front freezer plate for a nominal annual rental so long as the dealer complies with the franchise (Pl. Ex. 6, R. 242, 3157); the land lease, the "Conditional Reassignment of Lease" and the "Assignment of Lease and Assumption Agreement" all condition the rental of the land upon which the Carvel store is located upon the faithful compliance of the dealer with the terms of the franchise agreement and provide, in substance, that Carvel is entitled to step into the dealer's position as lessee, as part of the relief, if there is any substantial breach of the franchise (Pl. Ex. 7, R. 245, 3162; Pl. Ex. 7A, R. 250, 3162).

To apply the *per se* rule to total requirement or exclusive dealing contracts has been held reversible error. *Telecoin, supra; Lawlor* v. *National Screen Service Corporation*, 238 F. 2d 59 (3d Cir. 1956). This Court affirmed, 352 U.S. 992 (1957) the holding that ". . . exclusive agreements are not *per se* violation of the antitrust laws and are permitted in circumstances where the facts disclose a course of conduct and reasonableness of action not prohibited by the antitrust laws" (*supra*, 238 F. 2d 59 at 65).

After retrial on the merits, the treble damage suit was dismissed against all defendants. On further appeal, this was affirmed, *supra*, 270 F. 2d 146, 152-156 (3d Cir. 1959), *cert. den.* 362 U.S. 922 (1960).

Denison Mattress Factory v. *Spring-Air Company*, 308 F. 2d 403 (5th Cir. 1962), relying upon *Telecoin Corp.*, *supra*, applied the rule of reason and not the *per se* rule to uphold the exclusive dealing provisions of a franchise system similar to the one involved in this case (*supra*, 308 F. 2d 403 at 408, 409).

In *Pick*, *supra*, the Circuit Court affirmed dismissal of the complaint alleging violation of the Clayton Act. It is particularly in point on the question of whether Carvel may by contract insist that its dealers buy only Carvel ingredients. In that case, *Pick Manufacturing* in the business of manufacturing and selling replacement parts for various makes of automobiles complained that the dealer contracts by Chevrolet and Buick compelled them to sell exclusively only "new Chevrolet [or Buick] parts or accessories at not more than the current list prices issued by seller," and conversely provided that they could not sell or use any parts "not manufactured by or authorized by the Chevrolet Motor Company, a division of General Motors Corporation".

The Courts found that the restrictions to use Chevrolet parts on Chevrolet cars and Buick parts on Buick cars were "reasonable and necessary" to protect the business of the manufacturers and also the buying public (*id.* at 642). It also pointed out that this was not a horizontal arrangement between competitors, but a vertical one between a manufacturer and his dealer (*id.* at 643), and in the automobile business was particularly appropriate in view of

the manufacturer's contingent liability as a warrantor. This last reason is in essence equally applicable to Carvel as to a manufacturer's warranty of freedom from defects.

It seems fair to say that petitioners rather strenuously avoided the explicit guide lines laid down by this Court in *Tampa, supra,* which are directly applicable to all of the antitrust questions concerning the exclusive dealing and total requirement aspects of the Carvel franchise agreement. We are referring to the three principal rules stated in *Tampa,* 365 U.S. 320 at 327-328, (in summary):

> "*First,* the line of commerce . . . must be determined . . . *Second,* each area of effective competition in the known line of commerce must be charted by careful selection of the market area in which the seller operates, and to which the purchaser can practically turn for supplies . . . *Third,* and last, the competition foreclosed by the contract must be found to constitute a substantial share of the market."[43]

In fact, petitioners seem aggrieved that this Court in *Tampa* added a gloss by exposition and classification to the reasoning in *United States* v. *Standard Oil, supra* (Their Brief, pp. 30-31). It is not, we trust, inappropriate to suggest that the deficiency in petitioners' proof responsive to the standards stated in *Tampa, supra,* is hardly attributable to lack of zeal. Petitioners' failure to so much as attempt

[43] "To determine substantiality in a given case, it is necessary to weigh the probable effect of the contract on the relevant area of effective competition, taking into account the relative strength of the parties, the proportionate volume of commerce involved in relation to the total volume of commerce in the relevant market area, and the probable immediate and future effects which pre-emption of that share of the market might have on effective competition therein. It follows that a mere showing that the contract itself involves a substantial number of dollars is ordinarily of little consequence" (365 U.S. at 329).

to introduce proof of economic data may be due in part, as Judge Friendly states, to the indicated triviality of their damage as compared with the cost of assembling market data (R. 455). However, in the light of all the circumstances of the entire case from its beginning and the record before this Court, we feel justified to suggest that petitioners advisedly saved their money and effort in the gathering of market data because they discerned their inability to produce anything of value to their case.

Carvel on the other hand produced records of their yearly sales from 1953 to 1960 of ice cream mix to all Carvel outlets in the states of Connecticut, Massachusetts, Pennsylvania, New Jersey and New York (Def. Ex. C-9, R. 315, 3490). A compilation of the official records for the same period of production in each one of those states of frozen dairy products as compared with the total sales by Carvel, shows in each of the eight years from 1953 to 1960 that Carvel's share was less than 1/8 of 1% in the State of Pennsylvania, less than 1% in each of those years in the States of Massachusetts and Connecticut; and that the highest relative share of business is found in the two states of New Jersey and New York. Even that is under 2%; with a mean of about 1½% (Def. Ex. C-12, R. 318, 3501).

Another chart shows that of the approximate 200,000,000 gallons representing the production of manufactured dairy products in the five states just mentioned, Carvel's share never exceeded even 1% in any one of those years (Defs. Ex. C-11, R. 317, 3500).

Consequently despite petitioners' reliance on *per se* by their self-limiting stipulation, substantial evidence supports the concurrent findings by the courts below that under the "rule of reason" unlawfulness was not shown.

B. Carvel's Agreements with Essential Ingredient Suppliers (Respondents) Were Correctly Held Not to Be Unlawful.

The supply contracts with those companies manufacturing Carvel ingredients for it are perfectly proper and in no way constitute violations of the antitrust laws, particularly *per se* violations. The District Court found that "these contracts were not shown to be in any way illegal, still less illegal *per se*" (Record *52, 53*). The Court of Appeals unanimously affirmed the District Court (449). There was no reliance on conspiracy except as the written documents might themselves disclose. It was found that no such conspiracy existed (R. *51*).

We submit that the finding of the District Court as affirmed by the Court of Appeals with respect to the agreements between Carvel and its suppliers was justified. In analyzing the contracts they must be divided into two categories. First, there are the contracts Carvel has with the dairies which produced the Carvel special formula mix (Pl. Ex. 10, R. 252, 3186; Pl. Ex. 15, R. 337, 3205). These agreements provide that each dairy agrees to manufacture and sell to Carvel all the Carvel mix required by Carvel for sale to its franchisees in prescribed geographic areas. Carvel in turn agrees to purchase from the dairies all of its requirements of Carvel mix for such stores. The supply contracts further provide that the dairies agree to "deliver only Carvel mix to Carvel stores and no other ice cream mix or ice cream preparation of any kind" (R. *51-52*).

We submit that the agreements are perfectly proper exclusive total requirements contracts and that the contractual provisions prohibiting the delivery of other than Carvel mix to the stores was necessary in the public interest to

protect against the possibility of a palming off of any mix other than Carvel special formula mix to the individual Carvel franchisees.

As to the second category of supplier contracts represented by Carvel's contract with Eagle Cone (Pl. Ex. 11, R. 264, 3187), here the only restriction was that cones made pursuant to the design submitted by Carvel would be made only for Carvel. There was no restriction whatsoever in this agreement prohibiting dealings between the cone manufacturer and anyone else, including Carvel franchisees, with respect to the purchase and sale of ice cream cones other than those made in conformity with the special Carvel design.[44]

We submit that both categories of supplier contracts were clearly proper under well established authority. They certainly could not by any stretch of the imagination be construed as "*per se*" violations. *Tampa Electric Co.* v. *National Coal Co.*, 365 U.S. 320 (1960); *U.S.* v. *Columbia Steel*, 334 U.S. 495 (1948); *Rascom Launder Corp.* v. *Telecoin Corp.*, 204 F. 2d 331 (2d Cir. 1953), *cert. denied*, 345 U.S. 994.

V.

There was no error in the unanimous affirmance by the Court of Appeals of the Trial Judge's finding of no convincing proof of price fixing.

Petitioners do not really attempt to show any fundamental error of law by either of the lower courts with

[44] Judge Lumbard was mistaken in stating that there was a provision in the contracts between Eagle and Mohawk, prohibiting these suppliers from selling non-Carvel products to the individual dealers (R. 449).

respect to the price fixing question. On the contrary, they ask this Court to review for the third time, evidence already carefully reviewed by the two lower courts, with the hope that this Court will draw a different conclusion from the evidence than that unanimously reached by both lower courts.

We submit that there is no justification for doing so, and that abundant evidence before the trial court, which petitioners ignore, clearly demonstrates that the trial court correctly found that while Carvel admittedly set forth suggested prices which the individual franchisees could use as guides if they so chose, it was nevertheless clear that they were free to charge any price which they wished for their products and that at no time were they compelled by Carvel to charge prices fixed and determined by Carvel.

A. The Findings by the Courts Below.

> "There was no evidence that after February 27, 1956 Carvel imposed on any of the franchise operators any duty to maintain given prices. In fact in this later period Carvel prepared advertising signs and posters in which prices were left blank, or on which stickers could be pasted with various prices selected by the operators. * * * One of the plaintiffs' own items of evidence, a letter from Carvel dated September 3, 1957, which went out to all operators stated: 'Our supply department has blank signs to use should you care to increase or decrease your prices.'
>
> "There is no convincing evidence that the dealers do not presently have the right to fix their own sale prices to the public without penalty by Carvel. In the absence of any attempt by Carvel to impose a binding price structure, the fact that Carvel an-

nounced a schedule of suggested prices is not illegal" (R. *66-67*).

The Court of Appeals unanimously affirmed the finding of the District Court that there was no illegal price fixing, stating:

> "It is not the duty of this court to consider *de novo* the conflicting evidence and resolve this factual issue; rather, we must review the determination of the district court to determine whether or not it is clearly erroneous. See *Ruby* v. *American Airlines, Inc.*, 2nd Cir., Docket No. 28473, February 14, 1964, pp. 998-1002; *United States* v. *National Ass'n of Real Estate Boards*, 339 U.S. 485, 494-96 (1950). There is much evidence to support Judge Dawson's finding of fact that Carvel did not engage in an unlawful price-fixing scheme, and we cannot say that Judge Dawson's conclusion was clearly erroneous" (436-437).

B. The Limited Policy After 1955: Merely to Recommend Prices.

The relevant provision of the franchise agreement reads:

> "EIGHTH: The Dealer shall have the right to sell Carvel's Frozen Dairy Product and/or other items authorized for sale by him under the terms of this agreement *at any price that the dealer determines. Wherever Carvel recommends a retail price, such recommendation is based upon Carvel's experience concerning all factors that enter into a proper price, but such recommendation is in no manner binding upon the dealer*" (Pl. Ex. 1, R. 208, 212).

Individual franchisees were further advised that they were free to charge any price they wanted. In clear and explicit language Carvel's letter of February 27, 1956 addressed to each franchisee (in pertinent part), stated:

> "All references in your agreement and/or the Standard Operating Procedure Manual to the retail prices of Carvel's Frozen Dairy Product, in its various forms, are deemed to be references to recommended prices only. These prices are based upon your company's considerable experience, and the sincere conviction that the price so recommended is both acceptable to the public, and profitable for your operation. *However, you are entirely at liberty to vary these prices if you so desire,* and we disclaim any intention to control your prices" (Def. Ex. C-1B, R. 283-284, 3514).

In addition, specific correspondence between Carvel and its franchisees, including some of the petitioners herein, further showed Carvel's policy to limit itself to suggestions.

Thus on September 3, 1957, Carvel sent a letter to all Carvel franchisees advising that:

> "Our supply department has blank signs which may be used should you care to increase or decrease your prices" (Pl. Ex. 27, R. 274, 3259).

On October 10, 1957, Carvel wrote to the owner of Carvel Store #153 and advised him:

> "With regard to your request for permission to sell 3 pints of Carvel ice cream for $1. . . . *The final determination of any selling price at the customer level must be that of the store owner. The decision with regard to your request would therefore be yours*" (Def. Ex. C-3, R. 285, 290, 3522).

Under date of September 5, 1958, James Pierce, one of the petitioners herein, wrote to Carvel:

> "I would like to know if you have the signs that advertise the items and give the prices of them such

as the Take Home menu, made up without the prices on them . . .

"If you haven't any, could you have a few made up for me. If I can't get them I will have to put up my own signs with the new prices" (Def. Ex. C-3, R. 285, 286-287, 3522).

Carvel answered on September 8th:

"In reply to your recent request, please be advised that we do not have signs for Daily Features without recommended prices; however we do have price change stickers, which are available through the Order Department" (Pl. Ex. 43, R. 276, 3284; Def. Ex. C-3, R. 285, 288, 3522).

Seu, another of the petitioners herein, was advised by Carvel:

"With regard to your questions concerning prices, these questions would have to be resolved by you as the store dealer, since any determination of price with regard to the merchandise which you sell would have to be made by you and could not be made by this organization" (Def. Ex. C-3, R. 285, 289, 3522).

Under date of June 7, 1957, Carvel wrote to still another petitioner herein, Paul Giberman, on the subject of retail prices, saying:

"You also mention in your letter that you would like to have a large sign made advertising Papapaloozas at 7 for a $1.00. You, of course, realize that the Carvel organization can in no way control the price of any Carvel item which you offer to our customers. *The price for which you sell the item must be determined by you. Carvel can only recommend*

a fair price which shows you a fair profit on the item. However, we do require that the items be made according to the recipe as contained in your S.O.P. So long as the weights and products are as outlined in the recipes, the store owner's obligation to Carvel has been fulfilled" (*id.* at 285).

C. The Right to Decide Prices Was Understood and Exercised.

The evidence shows that after 1955 the determination of retail prices was a matter within the discretion of each franchisee. They exercised this right during the operation of their Carvel stores (R. 166-167; Pl. Ex. 43, R. 276, 3284; Def. Ex. C-1B, R. 283-284, 3514; Def. Ex. C-3, R. 285-294, 3522).

Since 1955, Carvel has also consistently explained to those *consumers* who write in to inquire why prices for the same Carvel items vary *from store to store,* that each franchisee is free to charge any price he wants and Carvel cannot and does not control the retail prices charged by the individual franchisee (Def. Ex. C-3, R. 291-294, 3522).

In addition to documentary proof, there was confirmatory oral testimony by Mr. Vettel, Carvel's General Manager. He gave uncontradicted testimony that after 1955 Carvel supplied the individual franchisees with posters having blank places for insertion by them of prices for each product, or selection of a desired price sticker which could be pasted into the blanks (R. 162-163; Def. Exs. C-16, C-17, 3517).[45] The franchisee could order price change stickers for any price he might desire (R. 162-163; Def. Exs. C-14, 3515; C-15, 3516).

[45] These Exhibits have been delivered to the Court.

Even Lester Modick, the one and only petitioner who testified, gave reluctant corroboration that the franchisees were free to charge whatever prices they wanted; he admitted that he received a blank sign from Carvel with the Carvel name affixed and without any prices printed thereon (R. 205); also that he sold a 15¢ cone, though the Carvel recommended prices for cones were 10¢ and 20¢, and on another occasion Mr. Modick charged a customer 50¢ for an ice cream cone in the presence of a Carvel supervisor (R. 206).

Significantly, while each of the petitioners had testified at length several months earlier in support of their claims for relief based upon allegations of fraud and deceit against the Carvel defendants, not a single one, including Modick, testified in the antitrust actions that Carvel compelled them to follow prices fixed and determined by Carvel.

D. The Trial Court's Finding that There Was No Convincing Proof of Price Fixing and the Court of Appeals' Unanimous Affirmance Thereof, Are in No Way Shown to Be Erroneous by the Isolated and Out of Context Excerpts Upon Which Petitioners Rely.

Petitioners rely heavily (Their Brief, p. 54) on Plaintiffs' Exhibits 40 (R. 379, 3281) and 42 (R. 275, 3283). Exhibit 40 is purportedly a letter from Carvel to the Gibermans advising them in part that, "only 10 and 20¢ cones are prescribed in the S.O.P." and that, "no one could make any criticism" if Giberman exceeded the minimum requirements of the S.O.P. Exhibit 42 purports to show that Giberman needed Carvel's permission to run sales. These excerpts extracted from two letters, cannot outweigh all the other proof of no price fixing, particularly

when these extracts are considered in proper context. Petitioners fail to mention that in the first paragraph of Exhibit 42 Carvel actually encourages sales upon the dealer's own initiative. Nor do they refer to the letter a few days later, on June 7, 1957, from Carvel to Giberman advising him that:

> ". . . you, of course, realize that the Carvel organization can in no way control the price of any Carvel item which you offer to our customers. *The price for which you sell the item must be determined by you*" (Def. Ex. C-3, R. 285, 3522).

Totally ignored by petitioners is the general letter circulated to all franchisees (including Giberman) that all prices are merely recommended prices which can be disregarded and that price change stickers were available (e.g., Pl. Ex. C-1B, R. 283-284, 3514; Pl. Ex. 27, R. 274, 3259). Equally conspicuous is the absence of testimony by any petitioner or other franchisee that they were required to, or in fact adhered to any price schedule emanating from Carvel for any reason whatsoever, or were inhibited from running sales as they desired.

Petitioners' dependence (Their Brief, p. 54) upon the phrase "Standard selling price" found on pages 16, 24, 41, 42, 44 and 48 of the post-1955 S.O.P. (Ex. 8A) is equally absurd. First, whether the prices in the post-1955 S.O.P. were labelled as "Standard" or "Recommended" was completely irrelevant in view of the text of paragraph "Eighth" of the Dealer's Franchise Agreement (Pl. Ex. 1, R. 208, 212, 3148) which clearly stated that all prices suggested by Carvel were in no way binding on the franchisee; also the supplemental letter of February 27, 1956

(Pl. Ex. C-1B, R. 283, 3514) addressed to all dealers informed them:

> ". . . all references in your . . . Standard Operating Procedure Manual to the retail prices of Carvel's Frozen Dairy Product, in its various forms, are deemed to be references to *recommended* prices only." (Emphasis in original.)

Though this should be dispositive, it should be noted that petitioners' brief is less than candid in neglecting to mention that the word "recommended" precedes the suggested price for the consumer items described at each of the following pages of § J of Exhibit 8A: 16, 16A, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 76S, 77S, 78S.

Mere reference by petitioners to the appearance of the phrase "Standard selling price" on certain pages of the post-1955 S.O.P., is misleading and inaccurate. To appreciate this, it is necessary to note that Exhibit 8A is not the post-1955 S.O.P., as it existed at any particular point in time during 1955 or thereafter. It is actually a composite of the S.O.P. as issued in 1955 together with subsequent substitute pages issued by Carvel from time to time thereafter. Thus in Exhibit 8A, Section J, there are actually two pages "16". The first page "16" is for "thick shakes" and next to the price set forth on that page is the phrase "recommended selling price"; immediately thereafter is another page "16" for a product known as "pre-pack tarts" to which appellants refer and which does bear the phrase "standard selling price". However, if one looks at the only page "46" in Section J, the identical

item—"pre-pack tarts"—is there described, with the phrase "recommended selling price" preceding the price set forth on that page. It is thus apparent that the page "16" of the post-1955 S.O.P. setting forth a "standard selling price" for "pre-pack tarts" was superseded at an early date by page "46" setting forth a recommended selling price for the same item.

The same holds true of the remaining pages which petitioners mention as having the phrase "standard selling price" placed next to the suggested price, i.e. pages "24", "41", "42", "44" and "48". Thus, for example, there are two pages "24" in Section J of Exhibit 8A. The first page "24" is for the "Carvel Chocolate Cocoanut Sundae" and bears the phrase "recommended selling price". Immediately thereafter, is another page "24" for the "Carvel Short Cake" that does bear the phrase, "standard selling price". However, that page was apparently superseded at an early date by page "43" of Section J, Exhibit 8A, which is also for the "Carvel Short Cake" and which bears the phrase "recommended selling price".

Petitioners attempt to impeach the credibility of Mr. Vettel by now arguing that he had been untruthful when he testified at the trial in 1962, that Carvel had not used the term "Standard Prices" for "at least four to six years" (Their Brief, p. 54). A careful examination of Section J of the S.O.P. shows that Mr. Vettel's testimony was completely truthful. See e.g. Ex. 8A, Section J, page "8" dated December 5, 1957, page "19" dated November 25, 1957, page "22" dated November 26, 1957, all bearing the phrase "recommended selling price".

Petitioners quote from Plaintiffs' Exhibit 25 (R. 359, 3254-5), a Bulletin dated August 18, 1954, and not germane

to the post-1955 franchise (Their Brief, p. 55). They use this to show that the dealer is not permitted to conduct special sales without first having received permission from Carvel (*id.*). It should be noted that under the post-1955 S.O.P. it was not made mandatory that the individual dealer clear special sales with Carvel but that this was merely "suggested"; this was made clear by the following testimony given by Mr. Vettel:

> "Q. Isn't it true that a store owner after the change in price policy in 1955 still had to obtain permission from Carvel to run a reduced-price sale? A. No. We asked that they contact us if they were going to run a reduced-price sale so that we could advise the other store owners in the neighborhood and all participate in the same sale.
>
> "Q. But he didn't have to come to Carvel for permission? A. No, sir" (R. 167).

The purpose of so advising other franchisees in the area is conceded by petitioners to be: "so that they might have an opportunity to participate therein" (Their Brief, p. 55). Obviously this includes the franchisee's choice not to have a sale.

Petitioners rely on Plaintiffs' Exhibit 39 (3280), which is a selection by petitioners of some, but not all, of the approved advertising material made available by Carvel (Their Brief, p. 55). They ignore other approved Carvel advertising material made available to the individual franchisee which contained blank spaces for prices where the franchisee could write in, or paste on whatever price he wanted (R. 162-163, 166; Def. Exs. C-16, C-17,[46] 3517; Def.

[46] Def. Exs. C-15, C-16, C-17 have been brought to this Court.

Ex. C-3, R. 285, 286-288, 3522; Pl. Ex. 27, R. 274, 3284; Pl. Ex. 43, R. 276, 3259).[47]

Retitioners' conclusion (Their Brief, p. 55) that franchisees would be denied cooperative advertising credits unless they advertised their products at Carvel recommended prices is outrageous because there is not an iota of evidence to support this inference. There was no testimony even suggesting this from any petitioner or other source. The fact that Plaintiffs' Ex. 89, the Carvel Daily Feature Calendar for July 1959, contains Carvel recommended prices, does not help to prove that the individual franchisees, and in particular the petitioners herein, were under even the slightest compulsion to follow these suggested prices. Further corroboration of the complete lack of compulsion upon franchisees is demonstrated by the fact that the covering letter sent with the Daily Feature Calendar for the month of July (Ex. 89) in discussing the contents of said Calendar, refers to said contents as "the *recommendations* of the calendar for the month of July" (Pl. Ex. 89, R. 418, 3641).

Petitioners' attack on the Carvel board of governors as an instrument of allegedly unlawful price fixing is also without justification. The uncontradicted testimony of Vettel, the Carvel organization's General Manager since 1955 (R. 158) was to the effect that it was a medium for discussion and exchange of information (R. 171-173). There is certainly no showing that it was used to compel anyone, par-

[47] As to those posters on which prices were already printed, Carvel made available price change stickers for whatever prices the franchisee requested (R. 162, Def. Ex. C-15; Pl. Ex. 43, R. 276; Def. Ex. C-3, R. 285, 286-288). We have already shown that when a special sign was preferred to a price change sticker, Carvel quickly gave permission to Giberman to have his own sign made up (Def. Ex. C-3, R. 285).

ticularly petitioners, to follow a fixed and determined schedule of prices.

We submit that petitioners have utterly failed to show any error in the trial court's finding, as unanimously affirmed by the Second Circuit, that there was no convincing proof of any attempt by Carvel to impose a binding price structure on the franchisees.

E. The Courts Below Were Not Clearly in Error in Finding No Illegal Price-Fixing.

The findings justified the statement in the opinion of the District Court:

> "In the absence of any attempt by Carvel to impose a binding price structure, the fact that Carvel announced a schedule of prices is not illegal. See *Maple Flooring Mfrs. Assn.* v. *United States*, 268 U.S. 563 (1925); *Cement Mfrs. Assn.* v. *United States*, 286 U.S. 588 (1925)" (R. 67).

Denison Mattress Factory v. *Spring-Air Co.*, 308 F. 2d 403 (5th Cir. 1962) in a closely similar situation affirmed the trial court's finding "that there was no price fixing in this case" (*id.* at 412). *United States* v. *Trenton Potteries Co.*, 273 U.S. 392 (1927) was cited and applied. The trial court in *Denison* disregarded telegrams indicating price fixing. The court, upon evaluation of the evidence as a whole preferred to rely on proof that dealers' prices differed and that what the franchisor had done "was not effective to control or fix prices" (*id.*). Since the trial court's decision was supported by substantial evidence it was affirmed with this language: "Whether the appellate court agrees with the choice made is not the question on

appeal" (*id.*). This Court, we submit, should not de novo weigh the evidence, pass on credibility or draw its own inferences, which is really what petitioners here are requesting when the two lower courts, after careful review, have already twice rejected the inferences petitioners contend should be drawn from the evidence. See *Scott* v. *Spanjer Bros., Inc.*, 298 F. 2d 928 (2d Cir. 1962) at 932; *Ideal Toy Corp.* v. *Sayco Doll Corp.*, 302 F. 2d 623 (2d Cir. 1962) at 624.

The Court of Appeals found "much evidence to support Judge Dawson's finding of fact that Carvel did not engage in an unlawful price fixing scheme" (R. 437), and affirmed unanimously. We submit that no showing whatever has been made of clear error.

F. Petitioners' Price Fixing Allegations Relate Solely to Products Manufactured and Sold Exclusively in Intrastate Commerce and Therefore Could Not Constitute a Violation of the Federal Antitrust Laws.

We submit that a further ground which requires affirmance of the trial court's finding denying liability based upon petitioners' price fixing allegations, is that it is clear from the record below that such price fixing allegations relate solely to products manufactured and sold exclusively in intrastate commerce. Hence there is no jurisdictional basis for invoking the federal antitrust laws.[48]

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[48] At page 53 of their brief, petitioners make the statement that Carvel did not appeal from the ruling of the trial judge adverse to Carvel relating to the pre-1955 franchise which Susser, McCoy, Frederick and Mueller had entered into. However, no appeal could have been taken by Carvel in these cases as no final judgment *as to Carvel* was entered or directed to be entered as to the actions brought by these plaintiffs; see footnote at page 4, *supra*.

In order to prevail on their allegations of price fixing, petitioners had the burden of showing not only the fact of price fixing restraints but also that the articles which were the subjects of the price fixing restraints were themselves in interstate commerce, or that restraints on intrastate transactions had a direct and substantial adverse effect upon the interstate commerce in the articles affected. *Brosious* v. *Pepsi Cola Co.*, 155 F. 2d 99 (3d Cir. 1946); *Tobman* v. *Cottage Woodcraft Shop*, 194 F. Supp. 83 (S.D. Cal. 1961).

As has already been mentioned, the various raw ingredients supplied to the individual dealer come to rest at his Carvel store. After these ingredients are supplied to, and come to rest at the store the individual dealer then utilizes these ingredients to manufacture his various ice cream products on the store premises. These manufactured ice cream products are a completely new product when compared with the ingredients supplied to the individual dealer for the manufacture of said products (R. 149). These products are then sold by the dealer at retail to customers who are the immediate consumers of the manufactured Carvel ice cream products. Thus the manufactured Carvel ice cream products made by the individual franchisee are not intended to, and in fact do not re-enter the flow of interstate commerce at any time. The essential jurisdictional prerequisite of being in or having a substantial effect upon interstate commerce is therefore not satisfied. The federal antitrust laws cannot be successfully invoked by petitioners in support of their price fixing allegations without such a showing. *Brosious* v. *Pepsi Cola Co.*, 155 F. 2d 99 (3d Cir. 1946); *Atlantic Co.* v. *Citizens Ice & Cold Storage Co.*,

178 F. 2d 453 (5th Cir. 1949), *cert. den.*, 339 U.S. 952; *Ewing-Von Allmen Dairy Co.* v. *C and C Ice Cream Co.*, 109 F. 2d 898 (6th Cir. 1940), *cert. den.* 321 U.S. 689 (1941); *Central Ice Cream Co.* v. *Golden Rod Ice Cream Co.*, 184 F. Supp. 312 (N.D. Ill. 1960), *aff'd* 287 F. 2d 265 (7th Cir.), *cert. den.*, 368 U.S. 829 (1961); *Tobman* v. *Cottage Woodcraft Shop*, 194 F. Supp. 83 (S.D. Cal. 1961).

It is not disputed that some of the individual franchisees may have stores located on main highways (though no such showing was made at trial) and that they may therefore be patronized by passing out-of-state customers. Yet this possibility would not be sufficient to bring the individual franchisee's retail operations within the jurisdictional prerequisite of being in, or affecting, interstate commerce. *Elizabeth Hospital, Inc.* v. *Richardson*, 269 F. 2d 167 (8th Cir. 1959), *cert den.*, 361 U.S. 884; *Atlantic Co.* v. *Citizens Ice & Cold Storage Co., supra.*

Nor would the fact that segments of the business of Carvel might be in interstate commerce, affect the fact that the manufacture and sale of the ice cream product by the local franchisee is a separate and purely intrastate operation not affecting interstate commerce and not within the jurisdiction conferred by the commerce clause. *Foster & Kleiser Co.* v. *Special Site Sign Co.*, 85 F. 2d 742 (9th Cir. 1936), *cert. den.* 299 U.S. [illegible] (1937); *United States* v. *Yellow Cab Co.*, 332 U.S. 218 (1947) at 233-234.

The trial court's opinion did not make a finding of fact contrary to our contention that the individual franchisee is engaged exclusively in intrastate commerce in manufacturing and selling Carvel's varied ice cream products. However, the trial court's opinion rejected our contention that

petitioners had failed to make the necessary showing of federal jurisdiction in these words:

> "Whatever might be the validity of the defendants' argument if the restrictions involved were imposed on an isolated dealer, it is clear that where they form part of Carvel's general policy of conducting its business, interstate commerce is so affected as to give this Court jurisdiction. The restrictions pertain not merely to the way in which the plaintiffs conduct their business but also to the way in which Carvel conducts its business. In this light it is obvious that the requisite effect on interstate commerce is present. See *United States* v. *Rock Royal Co-Operative, Inc.*, 307 U.S. 533, 568-69 (1939); *United States* v. *Standard Oil Co.*, 78 F. Supp. 850, 864-5 (S.D. Cal. 1948), *aff'd.* 337 U.S. 293 (1949)" (R. *68*).[49]

We respectfully submit that, at least as to petitioners' price fixing allegations, the trial court erred in holding on the basis of the above quoted reasoning that petitioners had established the necessary jurisdictional showing. We further contend that neither *United States* v. *Rock Royal Co-Operative*, *supra*, nor *United States* v. *Standard Oil Co.*, *supra*, are in point. In *Rock Royal Co-Operative*, the constitutionality of an order issued by the Secretary of Agriculture under the Agricultural Marketing Agreement Act of 1937, was challenged. It regulated the handling of milk in the New York Metropolitan area and provided

[49] The Court of Appeals, though noting our argument, found it unnecessary to pass upon it, in view of the fact that they unanimously affirmed the District Court's finding that, in fact the franchisees were *not* compelled to follow retail prices fixed and determined by Carvel (R. *437*, footnote 3).

inter alia for regulation "of the price to be paid upon the sale by a dairy farmer who delivers his milk to some country plant".

The Court described and answered in part the argument challenging the constitutionality of this Act, in the following language:

> ". . . It is urged that the sale, a local transaction, is fully completed before any interstate commerce begins and that the attempt to fix the price or other elements of that incident violates the Tenth Amendment. *But where commodities are bought* for use beyond state lines, the sale is a part of interstate commerce. Where local and foreign milk alike are drawn into a general plan for protecting the interstate commerce in the commodity from the interferences, burdens and obstructions, arising from excessive surplus and the social and sanitary evils of low values, the power of the Congress extends also to the local sales" (*id.* at 568-569).

We submit that this situation is completely distinguishable from the instant situation in a number of respects. Here there was no showing that any of the retail sales by any local Carvel franchisee travelled, or were intended to travel across state lines. Nor was it even contended that the interstate retail sales of some four hundred Carvel franchisees scattered throughout the eastern part of the United States could have any appreciable effect on interstate commerce.

Nor is *United States* v. *Standard Oil Co., supra*, at 864-865 in point. That case, insofar as it was relied upon by the trial court, held only that a distributive system of a producer and distributor of petroleum products which in-

volved constant interstate flow of such products and the interstate origin of many competitive products, automobile supplies and accessories was not a local matter outside the scope of the federal antitrust laws. It is true that the court in *Standard* noted that:

> "The control of a commodity originating in interstate commerce, although exercised after it comes to rest in a state, does not take it out of the purview of the Sherman or Clayton Acts, *if the flow is continuous, and if the restrictions affect it*" (*supra*, at 864).

But the fact is that in the instant case, it cannot be disputed that any continuous flow in interstate commerce is interrupted prior to the attachment of the alleged price fixing restrictions of which petitioners complain. The cessation of any continuous flow in interstate commerce is interrupted when the ingredients received by the individual franchisees are utilized by them in the manufacture and local retail sale of completely new Carvel ice cream products.

CONCLUSION

The entire tenor and thrust of petitioners' brief is aimed at persuading this Court to ignore the findings and conclusions of both Courts below and re-evaluate the evidence de novo.

No clear and basic error has been shown. No mistake has been pointed out in the principles of law applied to the facts and inferences, as found in the decisions below. This Court has consistently declined invitations "to try the case *de novo*." *Timken, supra,* 341 U.S. 593 at 597; *United States* v. *E. I. Du Pont de Nemours & Co.,* 351 U.S. 377 (1956) at 381; *United States* v. *Yellow Cab Co.,* 338 U.S. 338, 341 (1949).

Pick Manufacturing, supra, 299 U.S. 3, 4, a case analogous in material respects to this case, affirmed the judgment appealed from on concurrent findings of the courts below, that the Chevrolet dealer agreement was not violative of the antitrust laws. The Court said:

> "Under the established rule, this court accepts the findings in which two courts concur unless clear error is shown."

Application of this rule is not avoided by a showing that some of the evidence permits conflicting inferences. Nor does a dissent below inhibit acceptance of the findings of the lower courts on the facts. *Texas & N.O.R. Co.* v. *Brotherhood Ry. & S.S. Clerks,* 281 U.S. 548, 558-559, 560 (1930).

Petitioners limited themselves by their own choice to rely almost entirely on documentary evidence. Practically the only matter about which they have not raised any

question here, as they did not in the courts below, is their stipulation, incorporated by the trial judge in the pre-trial order, to rely exclusively on *per se* unlawfulness of the various agreements. Despite this, the evidence introduced at the trial was not limited by ruling or order of the court to what would be strictly germane for consideration of the case exclusively as one to be decided under the *per se* rule. Petitioners have not complained of any such rulings. There were none. Actually based on the evidence, the findings of the district court do not reflect a strict or narrow application of the *per se* rule. On the contrary, those findings reflect a careful weighing of all the evidence and the application to it of all pertinent criteria for ascertaining violations of the antitrust laws.

Likewise, the Court of Appeals in affirming the District Court made independent findings on the record as a whole not confining itself to the boundaries of *per se* violations, factually or legally. The Court concurred with the District Court unanimously, except for the one question which was the occasion of the dissent by Chief Judge Lumbard. He questioned whether there was sufficient evidence of justification for measures taken to protect the good will of the business. This question related to whether a tying arrangement could be said to exist. The findings, inferences and analysis in the majority Opinion show that a tying arrangement did *not* exist. Nor could it have existed, even for Chief Judge Lumbard without an innovation, which his dissenting opinion suggests, of introducing a presumption based on the licensing of a trademark. The evidence shows no basis for believing anything but that the findings of both courts are amply supported.

It has been our endeavor to show, not merely that the concurrent findings of both courts are free from clear error, but that the findings are supported by fair substantial evidence in the record.

We respectfully submit that there is no merit to the position of petitioners, and the judgments should be affirmed.

Respectfully submitted,

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Dated: New York, N. Y.
February 17, 1965

APPENDIX "A"

Listing of Inaccurate or Misleading Statement of Fact Set Forth in First Nine Pages of Petitioners' Brief.

1. At page "4" of petitioners' brief the statement is made:

> "In connection and simultaneously with the execution of the franchise agreements (Pl. Ex. 1, R. 208, 3149, and Ex. 2, R. 221, 3150), Carvel sells and leases to the dealer the patented freezer and other patented and unpatented equipment required for the operation of a franchised store (R. 34, 35; Pl. Ex. 3, R. 349, 3154; Ex. 4, R. 239, 3156; Ex. 6, R. 242, 2158)."

The statement is inaccurate because it ignores the fact that there was no testimony or any other evidence introduced to establish that in fact petitioners, or any of them, or any Carvel franchisee was compelled to buy equipment from Carvel. Indeed the evidence established that franchisees, including petitioners' were free to buy equipment from whatever source they wanted, provided Carvel specifications were met, and in fact exercised that right (R. 167, 170, Pl. Ex. 8A, § M, 3165; Def. Ex. C-5, R. 295-314, 3525).

2. At page "4" of petitioners' brief the further statement is made:

> "By Ex. 6, Carvel leases to the dealer, amongst other things, patented equipment for use in the operation of the franchised store, conditioned upon the lessee's faithful performance of the terms of the land lease covering the store premises."

The contents of Exhibit 6 show that this statement is misleading and inaccurate. It fails to disclose that the

so-called "patented equipment" leased to the dealer under Pl. Ex. 6 (R. 242, 3157), the "Signs and Special Equipment Lease", merely consists of various *design* patented items identifying the franchisee and his products as being "Carvel". More specifically the items which petitioners refer to as "patented equipment" consist of the front plate, valve, and decorator tip which gives the distinctive identifying swirl to the Carvel ice cream product as it is made by the franchisee (R. 168); two twelve foot neon signs displaying the name "Carvel"; and two Carvel "crown and cone" identifying insignias.

3. At page "4" of petitioners' brief, the still further statement is made:

> "The franchise agreements require the dealer to purchase from Carvel or its designated approved sources his entire requirements of mix, toppings, flavorings, cones and all other ingredients or supplies whether they are integral parts of the soft ice cream end product or merely used in connection with the sale thereof to the ultimate consumer. All such ingredients and supplies are sold by Carvel to the dealer at a profit."

The statement is misleading and inaccurate for several reasons.

First, that portion of the above statement to the effect that the franchise agreements require the franchise to purchase from Carvel or its designated approved sources "all other ingredients or supplies whether they are integral parts of the soft ice cream end product or merely used in

connection with the sale thereof to the ultimate consumer" is flatly untrue. The post-1955 franchise agreement clearly provides that the only ingredients required to be purchased from Carvel or Carvel approved sources are the "items sold as a part of the end product that is offered for consumption to the retail purchaser" (Pl. Ex. 1, R. 208, 211, Par. "SIXTH", 3148).

Second, there was no evidence introduced to show that all "ingredients and supplies are sold by Carvel to the dealer at a profit". The only evidence on this point related to cones, as to which it was established (and so found by the Court of Appeals) that these were sold to the franchisees at a price substantially below wholesale price (R. *443*, fn. 7) with Carvel's mark-up being just about 5% (R. *451*) out of which Carvel would have had to recoup its overhead expense.

4. At page "5" of petitioners' brief the statement is made:

> "The specifications for cones are that they be 'of a quality no less good than the standard quality cones produced by the Supplier at the time of the execution of this agreement' (Pl. Ex. 11, R. 264, 3186, 7)."

The statement is misleading because it ignores the fact that there are additional specifications prescribed for the manufacture of the cones, such as the design of said cones, and precise measurements as to height and outside diameter, and that the contract provides that the cone manufacturer shall be obligated to make cones of said design "only for Carvel, and for no other person" (Pl. Ex. 11, R. 264, 265, 3186).

Appendix "A"

5. At page "5" of petitioners' brief the following statement is made:

> "All other ingredients and supplies are manufactured for Carvel by designated suppliers in accordance with specifications and standards of quality furnished by Carvel (R. 39, 41, 197, 199, 200, 203).
>
> In this connection, Walter Simonsen, Hood's sales manager (R. 180), testified that there are many concerns who supply comparable flavorings (R. 39). Fred Vettel, Jr., Carvel's general manager (R. 32) also admitted that ingredients of comparable quality are obtainable from other than Carvel designated sources, but that Carvel does not furnish dealers with specifications and would not permit the dealer to purchase same even if they met Carvel specifications (R. 40, 1). He asserted that it would be impossible for Carvel to determine whether its dealers were following the specifications (R. 41)."

The statement is incorrect and misleading for several reasons.

First, it ignores uncontradicted testimony that the "end product" ingredients (in addition to the mix) are not only made up pursuant to specifications and standards furnished by Carvel, but that the Carvel syrups, toppings and flavorings are also made up pursuant to Carvel special formulas (R. 197, 198-199).

Second, that portion of the above statement to the effect that Simonsen testified that "there are many concerns who supply comparable flavorings (R. 39)" is false. A reading of R. 39 will reflect that the testimony actually given by Simonsen was that there was a "number of concerns" which

supplied flavoring "which is of good quality". The uncontradicted testimony of Vettel was that most of the "end product" ingredients made for Carvel were made up only for Carvel and that equivalent syrups and flavorings were not available to the general trade (R. 200, 203).

Third, that portion of the above statement to the effect that Vettel testified that "ingredients of comparable quality are obtainable from other than Carvel designated sources" is also inaccurate and misleading. Vettel's exact testimony (at R. 40, 41) cited by petitioners, was that he "would assume" that "nuts" and "cherries" of the "same quality" were obtainable from suppliers other than Carvel suppliers.* The overwhelming number of the 70 "end product" ingredients which must be purchased from Carvel (Pl. Ex. 8A, § H, Supply List No. 1, 3165) are covered by Vettel's testimony that they are made only for Carvel, pursuant to Carvel formula, and are not available to the general trade (R. 200, 203). In addition the above statement is a misleadingly incomplete one since the fact that "end product" ingredients are of comparable quality does not mean that they can be used interchangeably in making a uniform, high quality, ice cream product, since there is the additional important factor of the *compatibility* of each ingredient with the ice cream mix and with the machine (e.g. see R. 197-198).

Finally, with respect to the last portion of the statement in petitioners' brief about Carvel not permitting dealers

* At the same time Vettel's uncontradicted testimony was that while the nuts purchased by Carvel were "not superior to nuts that may be obtained of the same quality elsewhere", they were "superior in quality to some of the nuts available from other sources" (R. 40).

to purchase "end product" ingredients from sources other than Carvel, the exact testimony was as follows:

> "Q. Have you ever advised the Carvel store dealer that he can purchase those products [i.e., the 'end product' ingredients] from non-Carvel sources providing they meet Carvel specifications? A. No, we have not.
>
> Q. It is a fact, is it not, that Carvel does not permit that? A. We don't permit it because it would be impossible to police it, impossible to control it, it would be impossible in any way to determine whether each of the hundreds of dealers were following those specifications" (R. 41).

6. At page "5" of petitioners' brief the further statement is made:

> "The agreements also prohibit the dealer from operating a competitive dairy products business anywhere during the term of the agreement."

The statement is misleading. The franchise agreement actually provides that the franchisee "agrees that he will devote his best efforts and his entire time to the operation of the Carvel Store herein mentioned" (Pl. Ex. 1, R. 208, 213 Par. "ELEVENTH", 3148).

7. At page "6" of petitioners' brief the statement is made:

> "Further requirements were a conditional reassignment of the lease by the dealer to Carvel as security for the former's adherence to the terms of the franchise (Pl. Ex. 7, R. 245, 3162)."

Appendix "A"

Petitioners' conclusion that the conditional reassignment of the lease is designed to secure adherence to the franchise is unsupported by the Record. In fact this is realistically the only way open to Carvel to insure that its distinctive, design patented building will be used only for the sale of Carvel ice cream products.

8. At page "6" of petitioners' brief the further statement is made:

> "It is conceded that the end product manufactured by the dealer is a new product not delivered by Carvel (R. 15)."

The statement is incomplete in material respects and therefore misleading. It ignores the fact that while the end product may be a "new product not delivered by Carvel", it is in fact Carvel ice cream, made from special Carvel ingredients, pursuant to Carvel recipes, instructions and standards. Most important, the "end product" is explicitly identified and advertised to the public as being distinctive *Carvel* ice cream (e.g., see Defs. Ex. C-8, R. 425-427, 3482; Pl. Ex. 39, 3280). The District Court explicitly and correctly found that: "The end product which was sold to the public *was Carvel ice cream* and it was this product to which the Carvel trademark and good will attached" (R. 58, emphasis in original).

9. At page "8" of petitioners' brief the statement is made:

> "Par. 30 requires the dealer, in the event his volume of business reaches a certain figure, to purchase additional Carvel equipment."

The statement is misleading as it neglects to mention that since February, 1956 Par. 30 has been subject to written modification to the effect that the dealer is free to buy equipment from any source he desires provided Carvel specifications are met (Defs. Ex. C-1B, R. 283, 3514).

10. At page "9" of petitioners' brief the statement is made:

> "Invariably, such sign material is furnished with the retail price already printed thereon."

The statement is unsupported by any Record reference. In fact, the evidence introduced at trial was that in addition to price change stickers being made available by Carvel to the franchisees, signs without any prices were also freely made available, and that when Carvel did not have a sign available that a franchisee might request, permission was granted to him to have his own sign made up (R. 162-163; Defs. Exs. C-15, 3516; C-16, 3517; C-17, 3517; Def. Ex. C-3, R. 285, 286-288, 3522; Pl. Ex. 27, R. 274, 3259; Pl. Ex. 43, R. 276, 3284).

APPENDIX "B"

Trademarks for Ice Cream Products Owned by Companies with Main Offices in the Five State Area* as Published in the Official Gazette of the Patent Office Pursuant to §1062(a), Title 15, U.S.C.A. from January, 1955 to January, 1965

	Date of Publication for Opposition**	Date of Publication as Registered**	Mark***	Name and Address of Owner
1.	1/19/65		Frostee Humor	Good Humor Corporation, Englewood Cliffs, N.J.
2.	1/19/65		Colonial	Dolly Madison Foods, Inc. Philadelphia, Pa.
3.	1/19/65		Birds Eye	General Foods Corporation, White Plains, N.Y.
4.	1/5/65		Woodlawn	Dolly Madison Foods, Inc. d/b/a Woodlawn Farm Dairy Co., Scranton, Pa.
5.	12/15/64		Whammy-Stix	Good Humor Corporation, Englewood Cliffs, N.J.
6.	12/15/64		Wahoo Bar	Good Humor Corporation, Englewood Cliffs, N.J.
7.	12/15/64		Bullet	Fruit Products Corporation, Englewood, N.J.
8.	12/1/64		Sodaburst	General Foods Corporation, White Plains, N.Y.

* New York, New Jersey, Massachusetts, Pennsylvania and Connecticut.

** Dates refer to the weekly issues of the Gazette; all publications listed here are under Class 46—"Foods and Ingredients of Foods". As to Nos. 1-9 sufficient time has not yet passed to ascertain whether said marks will or will not be published as registered.

*** Marks listed do not include: (a) marks registered as service marks; (b) marks registered on the supplemental register; (c) marks registered under state trademark laws; (d) marks in use during this period but previously registered by owners in the five state area; (e) marks in use in this area during the period but registered by owners outside of the five state area; (f) marks in use during the period and in the area but not registered under either federal or state statutes; (g) marks issued to Carvel.

Appendix "B"

	Date of Publication for Opposition	Date of Publication as Registered	Mark	Name and Address of Owner
9.	9/22/64		MR. COOL	National Dairy Products Corporation, New York, N.Y.
10.	9/15/64	12/1/64	Good Humor	Good Humor Corporation, Englewood Cliffs, N.J.
11.	5/1/62	7/17/62	Van DeKamp's	General Baking Co., New York, N.Y.
12.	8/25/64	11/10/64	Top-Ems	Beaver Home Products Company, Tennsauken, N.J.
13.	8/18/64	11/3/64	Jahn's Since 1897	Jahn's Since 1897 Inc., Brooklyn, N.Y.
14.	8/18/64	11/3/64	Cartoon drawing of a boy's face with a bow tie	Court-Leigh Corp., Brooklyn, N.Y.
15.	6/23/64	9/8/64	Meteor	Joe Lowe Corporation, Englewood, N.J.
16.	6/23/64	9/8/62	Space-Shots	Joe Lowe Corporation, Englewood, N.J.
17.	6/23/64	9/8/63	Cosmaut	Joe Lowe Corporation, Englewood, N.J
18.	6/23/64	9/8/64	Zoomer	Joe Lowe Corporation, Englewood, N.J.
19.	6/23/64	9/8/64	Astral	Joe Lowe Corporation, Englewood, N.J.
20.	6/2/64	8/18/64	Super Humor	Good Humor Corporation, Englewood Cliffs, N.J.
21.	5/19/64	8/4/64	Country Corner	Good Humor Corporation, Brooklyn, N.Y.
22.	4/28/64	7/14/64	Coatswell	Hooton Chocolate Company, Newark, N.J.
23.	4/28/64	7/14/64	Flavorcoat	Hooton Chocolate Company, Newark, N.J.
24.	4/28/64	7/14/64	Outside-Inside	Good Humor Corporation, Englewood Cliffs, N.J.

Appendix "B"

	Date of Publication for Opposition	Date of Publication as Registered	Mark	Name and Address of Owner
25.	3/24/64	6/9/64	Jet Missile	Fruit Products Corporation, New York, N.Y.
26.	3/10/64	5/26/64	Jungle Stripe	Good Humor Corporation, Hoboken, N.J.
27.	3/3/64	5/19/64	Party Cake	Joe Lowe Corporation, New York, N.Y.
28.	2/4/64	4/21/64	Revelry	Joe Lowe Corporation, New York, N.Y.
29.	1/14/64	3/31/64	Cartoon representation of ice cream man with ice cream on a stick	Good Humor Corporation, Brooklyn, N.Y.
30.	12/17/63	3/3/64	Boutique	The Borden Company, New York, N.Y.
31.	11/19/63	3/31/64	Acme Ideal	Acme Markets, Inc., Philadelphia, Pa.
32.	11/19/63	2/4/64	Instant-Chef	Christie Food Products, Inc., Boston, Mass.
33.	11/19/63	2/4/64	Dairylea	Dairymen's League Cooperative Association, Inc., New York, N.Y.
34.	11/5/63	1/21/64	Sherbsicle	Joe Lowe Corporation, New York, N.Y.
35.	11/5/63	1/21/64	Sherbo-Split	Joe Lowe Corporation, New York, N.Y.
36.	10/29/63	1/14/64	A representation of three coins and the Trevi Fountain with the words Three Coins	Yorktowne Ice Cream Products Co., York, Pa.
37.	10/22/63	1/7/64	C-414	Hooton Chocolate Company, Newark, N.J.
38.	10/1/63	12/17/64	Sheffield Farms	National Dairy Products Corporation, New York, N.Y.
39.	9/24/63	12/10/63	Cloverdale	First National Stores, Inc., Somerville, Mass.
40.	9/17/63	12/3/63	Candy-Kid	Joe Lowe Corporation, New York, N.Y.

Appendix "B"

	Date of Publication for Opposition	Date of Publication as Registered	Mark	Name and Address of Owner
41.	9/3/63	11/19/63	Thindip	Joe Lowe Corporation, New York, N.Y.
42.	7/30/63	11/26/63	Carriage Trade Representation of a horse and carriage	Newport Carriage Trade, Inc., New York, N.Y.
43.	7/23/63	11/8/63	Glenside	Acme Markets, Inc. Philadelphia, Pa.
44.	7/16/63	10/1/63	Jahn's	Jahn's Since 1897, Inc., Brooklyn, N.Y.
45.	7/16/63	10/1/63	Barbana	Barbana Frozen Foods, Inc., York, Pa.
46.	7/9/63	9/24/63	Blackman's	M. R. Blackman & Co., Inc., Philadelphia, Pa.
47.	7/9/63	9/24/63	Blackman's Since 1909	M. R. Blackman & Co., Inc., Philadelphia, Pa.
48.	6/25/63	9/10/63	Sugar-Quick	J. A. Joffe & Co., Inc., Mt. Vernon, N.Y.
49.	6/4/63	8/20/63	Thin-Flo	Joe Lowe Corporation, New York, N.Y.
50.	5/21/63	8/6/63	Jolly Roger	Jolly Roger Dairy Products, Inc., Johnsville, Pa.
51.	5/14/63	7/30/63	Lady Penn	Penn Dairies, Inc., Lancaster, Pa.
52.	5/14/63	7/30/63	Dutch Gold	W. Ralph Ganiber, d/b/a Lancaster County Dutch Gold Apiaries, Lancaster, Pa
53.	4/23/63	7/9/63	Aktiv	Crowley's Milk Company, Inc., Binghamton, N.Y.
54.	3/19/63	6/4/63	Marvel	The Great Atlantic & Pacific Tea Company, Inc., New York, N.Y.
55.	3/12/63	5/28/63	Brigham's	Brigham's, Inc. Cambridge, Mass.
56.	3/5/63	5/21/63	Big 5	Fruit Products Corporation, New York, N.Y.

Appendix "B"

	Date of Publication for Opposition	Date of Publication as Registered	Mark	Name and Address of Owner
57.	2/26/63	5/14/63	Acme Virginia Lee	Acme Markets, Inc., Philadelphia, Pa.
58.	2/26/63	5/14/63	Over-Under Stix	Good Humor Corporation, Brooklyn, N.Y.
59.	12/18/62	3/5/63	Cherry Nugget	National Dairy Products Corporation, New York, N.Y.
60.	12/4/62	2/19/63	Lo-M-Lo	Germantown Manufacturing Company, Phila., Pa.
61.	11/27/62	2/12/63	Martin Century Farms	Martin Century Farms, Inc., Lansdale, Pa.
62.	10/16/62	5/7/63	Mr. Krunch	Joe Lowe Corporation, New York, N.Y.
63.	7/24/62	10/9/62	Charles Continental	Oak Point Creameries, Inc., New York, N.Y.
64.	5/22/62	8/7/62	Whole "N" One	Joe Lowe Corporation, New York, N.Y.
65.	5/15/62	7/31/62	Dubl-Whammy	Good Humor Corporation, Brooklyn, N.Y.
66.	5/15/62	7/31/62	Sealtest	National Dairy Products Corporation, New York, N.Y.
67.	5/8/62	7/24/62	Engle Farm Dairies	Sunbury Milk Products Company, d/b/a Engle Farm Dairies, Sunbury, Pa.
68.	2/27/62	5/15/62	"V" Cote	Joe Lowe Corporation, New York, N.Y.
69.	2/13/62	5/29/62	A representation of a mobile ice cream vending vehicle with an ice cream cone on top and the words Dairy Dan	Dairy Dan Inc. Wilkes Barre, Pa.
70.	1/30/62	4/17/62	Home Treat	The Borden Company, New York, N.Y.

Appendix "B"

	Date of Publication for Opposition	Date of Publication as Registered	Mark	Name and Address of Owner
71.	1/9/62	3/27/62	Hi-Cote	Joe Lowe Corporation, New York, N.Y.
72.	11/21/61	2/6/62	Vesta	Vesta, Inc., d/b/a Vesta, New York, N.Y.
73.	10/10/61	12/26/61	Crown saying de Pasquale's, above a curtain which surrounds the words Genuine Spumoni Deluxe Italian Ice Cream with a picture of a Spumoni Brick and a piece of Spumoni	Patrick J. de Pasquale, d/b/a De Pasquale Spumoni Company, Hartford, Conn.
74.	9/19/61	12/5/61	Tally Ho	Hershey Creamery Company, Harrisburg, Pa.
75.	5/23/61	8/8/61	Tinkle Bell with a cartoon representation of a child	Ace High Distributors, Inc., New York, N.Y.
76.	5/23/61	8/8/61	Miss Dairylea	Dairymen's League Cooperative Association, Inc., New York, N.Y.
77.	5/9/61	7/25/61	A square design with the word Rosebrand and drawings of roses thereon	Rose Brand Syrup Supply Co., Inc., Brooklyn, N.Y.
78.	4/25/61	7/11/61	Frigid treats	Clarence R. Hiester, d/b/a Schell's Dairy Swirl, Temple, Pa.
79.	3/21/61	6/6/61	Cherry Cherie	Foremost Dairies, Inc., New York, N.Y.
80.	2/28/61	5/16/61	Tootsie Roll	The Sweets Company of America, Incorporated, Hoboken, N.J.
81.	1/24/61	4/11/61	Ollie Orbit	Five Guys From Boston, Ind., d/b/a Oli Orbit, Boston, Mass.
82.	1/3/61	1/3/61	Jane Logan	Abbotts Dairies, Incorporated Phila., Pa.

Appendix "B"

	Date of Publication for Opposition	Date of Publication as Registered	Mark	Name and Address of Owner
83.	12/20/60	3/7/61	Dri-cote	Joe Lowe Corporation, New York, N. Y.
84.	11/29/60	2/14/61	Kool-Pops	General Foods Corporation, White Plains, N.Y.
85.	10/4/60	12/20/60	Unity	Frankford Grocery Company, Phila., Pa.
86.	9/13/60	11/29/60	Flagship	Vincent Sardo, d/b/a Flagship Ice Cream, Ridgewood, N.J.
87.	8/9/60	11/1/60	Sunshine Cup	H. P. Hood & Sons, Inc., d/b/a H. P. Hood & Sons, Boston, Mass.
88.	6/21/60	9/6/60	Class-Mate	D.C.A. Food Industries, Inc., New York, N.Y.
89.	6/7/60	8/23/60	Jelly Bean	Flavor Saver, Inc. Cambria Heights, N.Y.
90.	5/3/60	7/19/60	"Here's Howe"	George J. Howe Company, Inc., Grove City, Pa.
91.	4/26/60	7/12/60	A representation of a cow and a child with the words Crowley's Fresh Fresh	Crowley's Milk Company, Inc. Binghamton, N.Y.
92.	4/5/60	6/21/60	Shimmy	H. P. Hood & Sons, Inc., Boston, Mass.
93.	3/15/60	5/31/60	Giant Penguin	H. P. Hood & Sons, Inc., Boston, Mass.
94.	3/15/60	5/31/60	Cakesicle	Joe Lowe Corporation, New York, N.Y.
95.	10/18/60	1/3/61	Queen of Tarts	Hubert H. Hartman, d/b/a Dairy Queen, Fairport, New York
96.	3/8/60	5/24/60	5 star	Germantown Manufacturing Company, Phila., Pa.
97.	3/8/60	5/24/60	Monoflo	Germantown Manufacturing Company, Phila., Pa.

Appendix "B"

	Date of Publication for Opposition	Date of Publication as Registered	Mark	Name and Address of Owner
98.	3/8/60	5/24/60	S.C. Special	Germantown Manufacturing Company, Phila., Pa.
99.	1/19/60	4/5/60	Flavor Kist	Food Fair Stores, Inc., Philadelphia, Pa.
100.	11/17/59	2/2/60	Bartolini	Bartolini Ice Cream Company, New York, N.Y.
101.	11/10/59	1/26/60	Chocorich	Rose Brand Syrup Supply Co., Inc., Bklyn., N.Y.
102.	10/27/59	1/12/60	Suburban Farms	H. P. Hood & Sons, Inc., Boston, Mass.
103.	10/27/59	1/12/60	A caricature of a man inside a black ellipse under which is written Peter Plenty	Quik-Shop Corporation, Hastings-On-Hudson, N.Y.
104.	10/13/59	12/29/59	Sol-Kwik	Lanco Products Corporation New York, N.Y.
105.	9/29/59	12/15/59	Sorrento	Dairycrest Ice Cream Co., Inc., Brooklyn, N.Y.
106.	9/22/59	12/8/59	Black circle with a coronet under which is the word Coronet and the words By Hood	H. P. Hood & Sons, Inc., Boston, Mass.
107.	8/18/59	11/3/59	School Time	Joe Lowe Corporation, New York, N.Y.
108.	8/11/59	10/27/59	Bouquet	American Can Company, Easton, Pa.
109.	7/21/59	10/6/59	Oronoque Orchards	Winton Brothers, Inc., Stratford, Conn.
110.	7/21/59	10/6/59	Sugar-Lo	Kaydee Ice Cream Co., Atlantic City, N.J.
111.	7/7/59	9/22/59	A silhouette of a man, woman and child in a circle surrounded by the words Direct From Our Farm To You, and the word Dairylea	Dairymen's League Cooperative Association, Inc., New York, N.Y.

Appendix "B"

	Date of Publication for Opposition	Date of Publication as Registered	Mark	Name and Address of Owner
112.	6/30/59	9/15/59	Mono-Dri	Lanco Products Corporation, New York, N.Y.
113.	6/23/59	9/8/59	Figure-8 (a collective mark)	All Star Dairy Association, Inc., New York, N.Y.
114.	6/23/59	9/8/59	A silhouette of a woman and the words Figure-8 inside an outline of a V and an inverted V	All Star Dairy Association, Inc., New York, N.Y.
115.	6/2/59	6/27/61	Dairy Dan	Dairy Dan Incorporated, Wilkes Barre, Pa.
116.	5/19/59	8/4/59	A cartoon figure of a child wearing a hat with the name Miss Dairylea, and holding a glass of milk	Dairymen's League Co-operative Association, Inc., New York, N.Y.
117.	5/12/59	7/28/59	A cartoon figure of a woman's head and the words Sweet Life	Sweet Life Brands, Inc. Schenectady, N.Y.
118.	3/17/59	6/2/59	A cartoon drawing of a boy's face	Haxton Foods, Inc., Oakfield, N.Y.
119.	3/17/59	6/2/59	Park Club	Loblaw, Inc., Buffalo, N.Y.
120.	12/23/58	3/10/59	La Cafe Chambord inside a crest	Cafe Chambord, Inc., d/b/a Chambord Kitchen, New York, N.Y.
121.	12/16/58	3/3/59	Choc-Frost	Fruit Products Corporation, New York, N.Y.
122.	12/9/58	5/5/59	Sweet Life	Sweet Life Brands, Inc., Schenectady, N.Y.
123.	12/2/58	2/17/59	Evans Topping	E. B. Evans, Inc., Philadelphia, Pa.
124.	9/30/58	12/16/58	Orange Blossom	Hershey Creamery Co., Harrisburg, Pa.
125.	9/30/58	12/16/58	Regalia, with a cartoon of a king in a castle	Dairymen's League Cooperative Association, Inc., New York, N.Y.

Appendix "B"

	Date of Publication for Opposition	Date of Publication as Registered	Mark	Name and Address of Owner
126.	9/30/58	12/16/58	Regalia	Dairymen's League Cooperative Association, Inc., New York, N.Y.
127.	9/16/58	12/2/58	Koko-Freeze	H. P. Hood & Sons, Inc., Boston, Mass.
128.	9/9/58	11/25/58	Chiquita's	United Fruit Company, Boston, Mass.
129.	8/26/58	11/11/58	Dairylea	Dairymen's League Cooperative Association, Inc., New York, N.Y.
130.	8/26/58	11/11/58	Maltanza	Fruit Products Corporation, New York, N.Y.
131.	8/26/58	11/11/58	Royal	Standard Brands; Incorporated, New York, N.Y.
132.	8/5/58	10/21/58	Melomalt	The Borden Company, New York, N.Y.
133.	7/29/58	10/14/58	Fudjo	Hershey Creamery Company Harrisburg, Pa.
134.	7/29/58	10/14/58	Econ-o-way	The Borden Company, New York, N.Y.
135.	7/8/58	4/26/60	Golden Dawn	Golden Dawn Foods, Sharon, Pa.
136.	6/10/58	8/26/58	Gold Mine	Donut Corporation of America, New York, N.Y., now by change of name, DCA Food Industries, Inc.
137.	5/27/58	8/12/58	Hershey's	Hershey Creamery Company, Harrisburg, Pa.
138.	4/22/58	7/8/58	Drimix	The Borden Company, New York, N.Y.
139.	4/8/58	6/24/58	Vera Cruz and a crest	Limpert Brothers, Incorporated, New York, N.Y.
140.	4/8/58	6/24/58	A cartoon drawing of a face with a soft ice cream swirl on its head and the words Mr. Softee	Mr. Softee, Inc. Philadelphia, Pa.

Appendix "B"

	Date of Publication for Opposition	Date of Publication as Registered	Mark	Name and Address of Owner
141.	2/25/58	5/13/58	Regency	National Dairy Products Corporation, New York, N. Y.
142.	1/28/58	12/23/58	Bonnie Bar	I. N. Hagan Ice Cream Company, Uniontown, Pa.
143.	1/21/58	4/8/58	Svelte	The Borden Company, New York, N.Y.
144.	1/14/58	4/1/58	A drawing of a bird over the word Distelfink, which means gold finch	Distelfink, Inc., Harrisburg, Pa.
145.	12/31/57	3/18/58	All Star	John D. Utterback, Danbury, Conn.
146.	12/10/57	2/25/58	Big Wheel with a cartoon character on a bicycle, holding an ice cream cone	Oak Point Dairies of New Jersey, Newark, N.J.
147.	11/5/57	1/21/58	Dolly Madison over a silhouette of Dolly Madison	Philadelphia Dairy Products Company, Inc., Philadelphia, Pa.
148.	11/5/57	1/21/58	A silhouette of Dolly Madison	Philadelphia Dairy Products Company, Inc., Philadelphia, Pa.
149.	10/29/57	1/14/58	Missle	Fruit Products Corporation, New York, N.Y.
150.	9/3/57	11/19/57	Saroma	Standard Brands, Incorporated, New York, N.Y.
151.	8/20/57	11/5/57	Miss Bonnie	I. N. Hagan Ice Cream Company, Uniontown, Pa.
152.	8/20/57	11/5/57	Handie	I. N. Hagan Ice Cream Company, Uniontown, Pa.
153.	7/23/57	10/8/57	The word Stewart's over a drawing of a small lamb	Stewart's Ice Cream Company, Inc., Saratoga Springs, N.Y.
154.	7/16/57	10/1/57	Denise	R & G Milk Products, Inc., Bronx, N.Y.

Appendix "B"

	Date of Publication for Opposition	Date of Publication as Registered	Mark	Name and Address of Owner
155.	6/4/57	8/20/57	A hexagon with a churn and the word Dacoa	Dairy Corporation of America, New York, N.Y.
156.	5/21/57	8/6/57	Breakstone's	Breakstone Brothers, Inc., New York, N.Y. To National Dairy Products Corporation, New York, N.Y.
157	5/14/57	7/30/57	A drawing of a cow's head with the word Hood	H. P. Hood & Sons, Inc., Boston, Mass.
158.	3/12/57	5/28/57	A cartoon character inside a circle with the words Woody Woodlawn	Woodlawn Farm Dairy Company, Scranton, Pa.
159.	3/5/57	5/21/57	Hood	H. P. Hood & Sons, Inc., Boston, Mass.
160.	3/5/57	5/21/57	Harmonica	Milkmaid Ice Cream Company, Inc., White Plains, N.Y.
161.	2/19/57	5/7/57	Maltee-Frost	Fruit Products Corporation, New York, N.Y.
162.	12/11/56	2/26/57	Ice creamwich	Abbotts Dairies, Incorporated, Philadelphia, Pa.
163.	11/27/56	1/24/59	Chico	Dolly Fruit Products Corp., Brooklyn, N.Y.
164.	11/6/56	1/22/57	Early American	Hershey Creamery Company, Harrisburg, Pa.
165.	10/16/56	1/1/57	Nysice	Joe Lowe Corporation, New York, N.Y.
166.	10/9/56	12/25/56	Barbato Continental	Arden Farms Co., Long Island City, N.Y.
167.	10/2/56	12/18/56	Progress Its Flavor Wins Favor	The Borden Company, New York, N.Y.
168.	10/2/56	12/18/56	Bestovall	H. A. Johnson Company, Boston, Mass.

Appendix "B"

	Date of Publication for Opposition	Date of Publication as Registered	Mark	Name and Address of Owner
169.	8/14/56	9/10/57	Lollapalooza	Fruit Products Corporation, New York, N.Y.
170.	6/12/56	8/28/56	Vari-Top	American Food Laboratories, Inc., Brooklyn, N.Y.
171.	5/29/56	8/14/56	Sno-Frost	The Borden Company, New York, N.Y.
172.	5/22/56	8/7/56	Glacier Freeze	The Borden Company, New York, N.Y.
173.	5/22/56	8/7/56	C-It-All and design	Milkmaid Ice Cream Co., Inc., Rochester, N.Y.
174.	5/1/56	7/17/56	Polar Club	The Borden Company, New York, N.Y.
175.	4/3/56	6/19/56	Duncan Hines	Hines-Park Foods, Inc., Ithaca, N.Y.
176.	3/6/56	5/22/56	Tally Ho Farms	Hershey Creamery Company, Harrisburg, Pa.
177.	1/3/56	3/27/56	Merry-Molds	The Borden Company, New York, N.Y.
178.	1/3/56	3/20/56	Ciro's	Senator Frozen Products, Inc., New York, N.Y.
179.	12/13/55	3/6/56	Country Club	Country Club Ice Cream Company, Paterson, N.J.
180.	11/29/55	2/21/56	Hi Boy	Wendt's Cream Top Dairy, Inc., d/b/a Wendt's, Niagara Falls, N.Y.
181.	11/22/55	10/2/56	Freshpak	The Grand Union Company, East Paterson, N.J.
182.	11/22/55	2/14/56	Nancy Lynn	The Grand Union Company, East Paterson, N.J.
183.	11/8/55	1/31/56	Tricy Treat	Fruit Products Corporation, New York, N.Y.
184.	11/8/55	1/31/56	Elm Farm	Elm Farm Foods Co., Dorchester, Boston, Mass.

Appendix "B"

	Date of Publication for Opposition	Date of Publication as Registered	Mark	Name and Address of Owner
185.	10/25/55	1/24/56	Popsicle	Joe Lowe Corporation, New York, N.Y.
186.	10/25/55	1/17/56	Igloo	H. P. Hood & Sons, Inc., Boston, Mass.
187.	10/4/55	1/3/56	Sundae Snack	Sea Smack Company, Philadelphia, Pa.
188.	9/27/55	12/27/55	Dutch Gold and design	Lancaster County Dutch Gold Apiaries, Lancaster, Pa.
189.	9/27/55	12/27/55	Pensupreme	Penn Dairies, Inc., Lancaster, Pa.
190.	7/26/55	11/27/56	Dubl I-Stix	Good Humor Corporation, Brooklyn, N.Y.
191.	7/19/55	10/25/55	Screen Star Bar	Joe Lowe Corporation, New York, N.Y.
192.	7/19/55	10/25/55	Picture Pop	Joe Lowe Corporation, New York, N.Y.
193.	7/12/55	10/18/55	Miss Sno-Frost	The Borden Company, New York, N.Y.
194.	7/5/55	10/11/55	Bigga Ba	Joe Lowe Corporation, New York, N.Y.
195.	7/5/55	10/11/55	Charlotte Freeze	The Borden Company, New York, N.Y.
196.	6/28/55	9/27/55	Ginga-Peachee	Hampton Pharmacy, Inc., Long Island City, N.Y.
197.	6/7/55	9/6/55	Celebrity	The Borden Company, New York, N.Y.
198.	5/31/55	8/23/55	Topper	Eskimo Pie Corp. Bloomfield, N.J.
199.	5/10/55	8/9/55	Duncan Hines & design	Hines-Park Foods, Inc., Ithaca, N.Y.
200.	5/10/55	3/13/56	Duncan Hines	Hines-Park Foods, Inc., Ithaca, N.Y.

Appendix "B"

	Date of Publication for Opposition	Date of Publication as Registered	Mark	Name and Address of Owner
201.	4/26/55	7/19/55	Representation of calf holding a basket of milk bottles	Alderny Dairy Company, Newark, N.J.
202.	4/26/55	7/19/55	Glacier Club	The Borden Co., New York, N.Y.
203.	4/12/55	7/12/55	Creamsicle	Joe Lowe Corporation, New York, N.Y.
204.	4/12/55	7/12/55	Dreamsicle	Joe Lowe Corporation, New York, N.Y.
205.	4/12/55	7/12/55	Fudgsicle	Joe Lowe Corporation, New York, N.Y.
206.	4/12/55	7/12/55	Daitch Daypack w/ design	Daitch Crystal Dairies, Inc., Bronx, N.Y.
207.	3/29/55	6/28/55	Woody Woodlawn	Woodlawn Farm Dairy Company, Scranton, Pa..
208.	2/8/55	4/3/55	Super Twist	Lester T. Sawyer, d/b/a Hycrest Farms, Sterling, Mass.
209.	1/18/55	4/12/55	Screen-O	Joe Lowe Corporation, New York, N.Y.
210.	1/11/55	4/12/55	Betsy Ross	Betsy Ross Ice Cream Co., Inc., Phila., Pa.
211.	12/22/59	3/8/60	Representation of ice cream vending vehicle	Dairy Dan, Inc., Wilkes-Barre, Pa.
212.	8/8/61	10/24/61	Siesta	Foremost Dairies, Inc., New York, N.Y.
213.	2/24/59	5/12/59	Mini-Cal	Whitelawn Dairies, Inc., Brooklyn, N.Y.

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IN THE

Supreme Court of the United States

October Term, 1964

No. 355

BERNARD SUSSER, *et al.*,

Petitioners,

—against—

CARVEL CORPORATION, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

OBJECTIONS OF THE CARVEL RESPONDENTS TO THE MOTION BY INTERNATIONAL FRANCHISE ASSOCIATION, INC. FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE

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Statement

The Carvel respondents respectfully submit this response stating their objections, and the reasons in support thereof, to the motion by International Franchise Association, Inc. (hereinafter referred to as "International") for leave to file a brief as *amicus curiae* in this matter.

Prior Proceedings

The decision of the Court of Appeals was filed on May 8, 1964 (R. 432). The petition for certiorari was filed on August 6, 1964; certiorari was granted on October 26, 1964.

The printed "Transcript of Record" prepared by the Clerk of this Court was served on all parties on December 17, 1964. Pursuant to Rule 41 of the Rules of this Court petitioners were required to, and in fact did, file their brief with the Court by January 17, 1965. By February 18th all the respondents herein had served and filed their answering briefs. On February 19, 1965 the Carvel respondents were served with a copy of International's "Motion For Leave To File Brief As *Amicus Curiae* And Brief Of International Franchise Association, Inc., As *Amicus Curiae*" which had been filed with the Clerk of this Court on February 17, 1965. No explanation or justification is set forth in the motion as to why International took no action with respect to making said motion during the some four months after the granting of the petition for certiorari, and waited until the very last day for the filing of briefs before filing and serving the instant motion for leave to intervene as *amicus* (which was bound together with its *amicus* brief).*

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* It appears that International's brief can not be timely filed with the Clerk of this Court as required by Rule 42. Thus Rule 42(2) provides that the brief of an *amicus* must be filed within the time allowed for the filing of the brief of the party supported, i.e., in this case by February 18, 1965. Though International, possibly with the thought of attempting to overcome this, submitted its *amicus* brief physically bound together in the same volume with its printed motion for leave to file such brief, that does not overcome the objection since under Rule 42(2 an *amicus* brief may be "filed only after order of the court or when accompanied by written consent of all parties to the case". Since neither condition was satisfied at the time International submitted its *amicus* brief as part of the same volume which also contained its motion for leave to file such brief, there has not yet been a proper filing of the brief and the date for making a timely filing of the brief has now passed.

Furthermore we submit that it is, at best, doubtful whether International's motion can be considered as having been "timely . . . presented to the court" as required by Rule 42(3) in view of the timing of the making of the motion.

Carvel Respondents' Reasons for Withholding Consent

Introductory.

We have declined to consent to the filing of, and now oppose International's motion for leave to file an *amicus* brief herein, for two major reasons.

First, we believe that all relevant questions of fact and law in this case have already been fully briefed by the parties to this case and therefore there is no necessity for the filing of an *amicus* brief.

Second, we believe that permitting the filing of the instant *amicus* brief would be undesirable since we view it as an unjustified attempt to have this Court enunciate doctrines of law not limited to the factual situation in the case at bar, but extending to myriads of other varying factual situations not now before the Court.

The contemplated *amicus* brief is unnecessary.

All relevant issues of fact and law have been thoroughly examined in the detailed briefs already filed by the parties to this matter.

Paragraph "3" of Rule 42 explicitly provides that where it is necessary for a party to make a motion for leave to file a brief as *amicus* because the parties to the proceeding have refused to consent to the filing of such brief (as in the instant case) such motion—

> "shall . . . set forth facts or questions of law that have not been, or reasons for believing that they will not adequately be, presented by the parties, and their relevancy to the disposition of the case."

We submit that International's motion is defective in that it fails to make any showing, as required, that there

are "facts or questions of law" that will not be adequately presented by the parties.

At the time that oral request was made of us by counsel for International for our consent to the filing of an *amicus* brief we referred them to Rule 42 and advised them that we were of the opinion that there was no need for the filing of an *amicus* brief. Neither at that time, nor in their subsequently made motion now before the Court is any such showing made.

From the facts set forth in International's motion it would appear that permitting the filing of an *amicus* brief would be undesirable.

International urges that it be permitted to file an *amicus* brief on behalf of its member franchisors who are engaged in distributing through franchisees, a variety of products including bicycles, rental automobiles, dry cleaning and home cleaning services, personnel and employment agency services, paints, automobile supplies and tools. International further asserts that the decision in this case "will necessarily affect numerous other franchising arrangements".

We submit that the foregoing indicates that International is proceeding on the erroneous assumption of treating all franchising arrangements as having a substantial identity with one another. This is not the fact. Actually there is great variety in the contractual arrangements of each franchising organization compared with those of others. Furthermore, there is a variety in operation from franchisor to franchisor not only where the end product being distributed varies, but even where the same end product is being distributed through different franchising systems. The franchisor who distributes brand name bicycles or

rents automobiles presents a radically different situation from the instant one where Carvel arranges for its franchisees to manufacture its ice cream from its secret, special formula ingredients, pursuant to its recipes and then sell it under Carvel trademarks. Indeed, as the court below noted, even with respect to arranging for the manufacture and sale of ice cream products through franchised outlets, there are substantial and significant differences in contractual arrangements and operations when one franchising system is compared to another in the same field (R. 445).

We submit that this Court should adhere to its historic policy of deciding matters on a case by case basis and avoid the invitation to deal in generalities applicable to all franchise systems which International apparently seeks by asking for the granting of its motion for leave to file its *amicus* brief.

CONCLUSION

The motion for leave to file a brief as *amicus* should be denied.

Respectfully submitted,

HERMAN L. WEISMAN
Attorney for the Carvel Respondents

HERBERT F. ROTH
ALAN M. GELB
AMEN, WEISMAN & BUTLER
Of Counsel

Dated: New York, N. Y.
February 24, 1965

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Supreme Court of the United States

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BERNARD SUSSER, *et al.*,

Petitioners,

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Respondents.

RESPONSE OF EAGLE CONE CORPORATION

Eagle Cone Corporation respectfully submits this response in opposition to the motion of Jerrold G. Van Cise, Attorney for International Franchise Association, Inc., for leave to file a brief as *Amicus Curiae.*

By letter dated February 17, 1965 the counsel for the International Franchise Association, Inc. requested Eagle Cone Corporation to consent to the filing of said *Amicus Curiae* brief. By letter dated February 19, 1965, I replied to said request and stated that our client would not consent to the filing of said brief. I stated the following:

> "The position of this office is that we are opposed to the filing of said brief on behalf of International Franchise Association, Inc. We believe that the issues involved in the case are adequately treated in the briefs filed by the parties concerned."

In the brief filed on behalf of Eagle Cone Corporation we endeavored to demonstrate that the position of Eagle Cone Corporation was simply to supply ice cream cones to

Carvel. We had no function in the franchised system as such. We were not the distributor, but merely a manufacturer who supplied Carvel, the distributor. Accordingly, we are apprehensive that the position of Eagle Cone Corporation may be jeopardized in the hearing of the main appeal if the issue is to be expanded into a broad investigation of the legality of franchise operations. The specific issues involved in the case have been briefed with care and skill by all parties immediately concerned. We believe that the legality of the Carvel-Eagle contract can be determined by settled principles of law without reference to the social and economic development of the franchise industry in the United States. Similarly, the legality of the franchise agreement between Carvel and its dealers will necessarily be judged on the basis of the applicable statutes and the decisional law. No benefit will be gained by referring to contracts or methods applicable to other industries or areas of commerce.

The Court is certainly able to take judicial notice of the wide-spread existence of franchised enterprise in our economy without having to resort to specific statistical data in respect thereof. In three recent decisions cited at page 4 of the Eagle brief, the respective courts gave their consideration to the particular legal problems within the framework of the expanding franchising development. It does not appear that the Courts were required to go into such development more minutely than by simple reference thereto as matters within the public knowledge.

So, also in the instant case, both Judge Dawson and the Court of Appeals for the Second Circuit were quite aware of the fact that franchishing is a wide-spread phenomenon in the United States and that the Carvel operation is part of such pattern. The problem now before the Supreme Court

is the legality of the Carvel operation and of its contracts with three companies who supplied Carvel. The Court will not be called upon to make any pronouncement in respect of franchising as such, or to define limits thereto.

WHEREFORE, your Eagle Cone Corporation respectfully prays that the motion for leave to file an *Amicus Curiae* brief should be denied.

Respectfully submitted,

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Dated: February 24, 1965

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 355

BERNARD SUSSER, ET AL.,
Petitioners,

v.

CARVEL CORPORATION, ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONERS

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The Daily Record Co., Baltimore, Md. 21202

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONERS

ARGUMENT

The purpose of this reply brief is to focus upon the issue which petitioners believe is paramount in this case. It is petitioners' position that Carvel, through its franchise agreements, has imposed a tying arrangement upon its franchise dealers which is *per se* unlawful. This tying arrangement has been systematically and vigorously enforced by Carvel.

The applicant for a Carvel franchise desires to secure a license of the Carvel trademark with the right to operate a retail store displaying the trademark and to sell Carvel soft ice cream and other food products. This applicant further desires to have the benefit of Carvel's expert supervision and guidance in the marketing of soft ice cream

and other commodities. For this valuable license and service, he is willing to pay a royalty to Carvel.

Carvel, however, has conditioned the grant of a license of its trademark, with the right to operate a retail store and the availability of its expertise in the marketing of soft ice cream and other food products, upon much more than the payment of a royalty. Carvel, by means of contractual provisions found in the franchise agreements, further requires that the franchise applicant agree also to purchase from Carvel most of the commissary goods, supplies and equipment which he will need in the day-to-day operation of his retail store. The franchise applicant has but one choice; if he desires to secure the Carvel franchise, he must agree to buy practically all of his commissary items, supplies and equipment from Carvel.

Moreover, the franchise applicant must adhere to this tying arrangement for the duration of his relationship with Carvel. The continued use of the Carvel trademark, the availability of Carvel's expertise and the operation of the Carvel store is conditioned upon the franchise dealer's continued purchases of commissary goods, supplies and equipment from Carvel. If the franchise dealer attempts to purchase these products elsewhere, he will lose his franchise and will be required to surrender his store and equipment to Carvel at a fraction of his substantial cost (See e.g., R. 14, 245-249, 392-393). The franchise dealer will further be restrained from engaging in a similar business for a period of five years within a radius of 25 miles of his store (R. 219). These severe penalties for non-compliance assure Carvel of the dealer's continued purchase of tied-in products.

The Hearing Examiner in his Initial Decision, *In the Matter of Carvel Corporation*, FTC Docket No. 8574, filed

May 25, 1964,* a proceeding similar to the present, summarized Carvel's arrangements with its dealers as follows:

> . . . Carvel's franchise agreements, and its operations under them, effectively prevent its dealers from purchasing freezers, mix, cones and commissary items generally from sources other than Carvel, and impose substantial restraints upon its dealers in purchasing other equipment and items. The restraints are clear, specific and effective. . . .
>
> The Carvel franchise system is founded upon the use of the Carvel name, insignia, designs, procedures, supervision and services. Under the franchise agreement, a fully equipped store, ready to operate, is leased, and its equipment is sold, to the dealer. He is trained in the Carvel method of operation, and is supplied with detailed guides covering the procedures to be followed and the method of producing and dispensing approved items, and he is afforded such supervision and guidance as needed in the operation of the store. The dealer is licensed to use the Carvel name, products and techniques, including copyrights and certain patented equipment, some of which is leased to him.
>
> These are undoubtedly valuable rights and services . . . which may be obtained only upon carefully defined terms and conditions. In return for them, the dealers make substantial initial investments, and undertake the obligations to Carvel discussed above. Upon breach of those obligations, the dealers are subject to the termination of all of their rights under the franchise, the surrender of their stores and equipment at a fraction of their investment, and sharp limitations upon their right to engage in a similar business.
>
> The Carvel franchises are, accordingly, agreements which tie the purchase of equipment, ice cream mix and commissary items to leases and licenses to use the Carvel name, copyrights, patents, products and

* The Commissioners of the Federal Trade Commission heard oral argument on November 18, 1964, on appeals by counsel supporting the complaint and the respondents, but have not issued an opinion as of the date of this brief.

> techniques. They are "tying agreements", and are, therefore, unreasonable if Carvel "has sufficient economic power with respect to the tying product to appreciably restrain free competition in the market for the tied product and a 'not insubstantial' amount of interstate commerce is affected" (¶¶55-58 at pp. 20-21).

The Hearing Examiner, after reviewing economic data pertaining to Carvel's share of the soft ice cream market in the New York metropolitan area, concluded:

> The record in this proceeding convincingly establishes that the exclusive dealing requirements of Carvel's tying agreements with its dealers are associated with a plan and purpose to restrain interstate commerce by isolating from the competitive arena, and channeling to Carvel alone, the entire purchases of the tied products by its dealers. Others are foreclosed from competing with Carvel and selling such products to its dealers, and the dealers, as independent businessmen, are denied the advantages historically attributed to such competition (¶96 at p. 31).

The economic data in the record in the present case amply demonstrates that a substantial market has been foreclosed as a result of the tying arrangement imposed by Carvel on its approximately 400 dealers (R. 19). For example, in 1960, tied-in gross sales by Carvel to its franchise dealers in the five state market were (R. 29):

Mix:	$2,611,324.
Other Ingredients and Supplies:	1,354,599.
Equipment:	494,766.
Total	$4,460,689.

In addition, Carvel realized about $450,000. in royalties on 1,777,650 gallons of mix sold to dealers in the five state market (R. 315-316, 212).*

* Carvel also realizes additional revenues on the lease of stores to its dealers.

Further, a comparison of statistics of the Department of Agriculture pertaining to total gallons of soft ice cream mix produced in the five state area in 1959, with statistics submitted by Carvel for the same year, indicates the following:*

	Department of Agriculture Annual Statistics Bulletin (Exhibit C-10) Total Gallons of Soft Ice Cream Mix Produced in 1959	*Carvel Statistics* (Exhibit C-9) Total Gallons of Soft Ice Cream Mix Produced for Carvel Franchise Dealers in 1959	Carvel's Approximate Percentage of the Soft Ice Cream Mix Market in 1959 (Computed)
Connecticut:	269,000	143,340	55
Massachusetts:	182,000	24,380	13
Pennsylvania:	4,800,000	159,920	3
New Jersey:	2,212,000	347,000	16
New York:	5,416,000	1,190,920	20

The foregoing data clearly indicates that Carvel does enjoy sufficient economic power to restrain appreciably competition in the market for tied-in products.

Because of the unique and desirable characteristics of the Carvel trademark and franchise, the dealer applicant is persuaded initially to agree to purchase most of his commissary and other supplies and equipment from Carvel. The prospective dealer is advised by Carvel that its trademark is one which "practically assures success" (R. 427):

* Carvel Exhibits C-9 (R. 315) C-11 (R. 317) and C-12 (R. 318-319) compare total gallons of *Carvel soft ice cream* mix sold by Carvel in the five state area with the statistics for *total frozen dairy products*, which include hard and soft ice cream, sherbets, ice milk, custard, etc., sold in each of the five states as set forth in the Bulletins of the Department of Agriculture entitled *Production of Manufactured Dairy Products* for the years 1953 to 1959 (admitted in evidence as Carvel Exhibit C-10 (R. 156, T. 3494, 3499)). After 1957, these Bulletins, constituting Exhibit C-10, contain separate gallon figures for soft ice cream. The gallon figures used above are taken from the 1959 Bulletin.

This assertion is strongly buttressed by the statement that the average store displaying the Carvel trademark "grosses $40,000, nets $13,000," while "[s]ome larger units do as much as $80,000" of which amount "the net profit for the unit owner is one-third".* Furthermore, there have been "[n]o business failures in over 21 years in the Carvel chain," which has made over 3,000,000,000 customer services and has thus realized over $300,000,000 in revenues as of 1958 (R. 18, 427). These widely-advertised and desirable features of the Carvel franchise, which are available for an initial investment of approximately $10,500, are sufficient to obtain the dealer's initial acquiesce in the tying arrangement.** After the dealer has executed the franchise agreements, however, the threat of loss of his substantial investment in the franchise is sufficient to compel compliance with the tie-in provisions. The unique and desirable features of the Carvel franchise initially account for Carvel's success in obtaining a tying commitment, while the forfeiture provisions of the agreements assure continued compliance.

Petitioners respectfully submit that Carvel's tying arrangement qualifies as a *per se* violation under either the standard set forth in *Northern Pacific v. United States*, 356 U.S. 1 (1958), which requires a showing of dominance, or the standard enunciated in *United States v. Loew's, Inc.*, 371 U.S. 38 (1962), which provides for an inference of dominance from a tying item's desirability or from uniqueness in its attributes.

Carvel's tying arrangement is further directly responsible for its refusal to permit franchised dealers to sell quality food products customarily sold in competitive stores. A Carvel dealer may not sell Coca-Cola or Hire's

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* See pages 12-13 of the opinion of DAWSON, D.J., in the fraud suit dated February 7, 1962, which is part of the Record in this case.

** Plaintiffs' Exhibits 22 and 23, admitted into evidence at R. 18, 19.

Root Beer. He may not offer for sale Wise's Potato Chips, Becker's Pretzels, Nabisco's Cookies or Nestle's Hot Chocolate (See e.g. R. 354). Such quality products are obviously compatible with the sale of soft ice cream and would not harm Carvel's reputation, but would mean additional revenues for the dealer. However, since Carvel derives profits from the sale of tied-in products, it naturally will not permit the franchise dealer to offer for sale commodities which would compete, in any way, with those supplied by Carvel. For this reason, a dealer may not sell a quality food product until Carvel has made some arrangement whereby it will derive a profit from the sale of the product to the franchise dealer. At that time, and at that time only, will Carvel amend and supplement the franchise agreement and permit the dealer to purchase the product solely from Carvel (R. 404, 415). It is also made clear to the dealer that he must not attempt to acquire the product elsewhere, for the purchase or sale of an unauthorized product is cause for the forfeiture of his franchise. Thus, the newly-approved item is tied-in to the franchise to operate a Carvel store.

Carvel attempts to justify the tying arrangement embodied in its franchise agreements on the basis that the arrangement is necessary to protect its reputation. Specifically, Carvel complains that it would be impractical to provide specifications to alternative suppliers. This claim is made notwithstanding the fact that Carvel has been able to provide specifications to a number of dairies and cone manufacturers, which supply mix and cones in specified territories to Carvel dealers. The Hearing Examiner, *In the Matter of Carvel Corp., supra*, determined that Carvel could provide specifications to other suppliers and therefore, permit the franchise dealer to purchase supplies in a competitive market. The Examiner concluded that "[t]he

protection of the goodwill and public acceptance of Carvel's products, accordingly, does not necessitate the use of the exclusive tying conditions of Carvel's franchising system", and "Carvel's tradename cannot be used as a device to justify practices which unreasonably restrain trade . . . and respondents concede that the use of secret formulas confers no special immunity for antitrust conduct" (¶106 at p. 34).*

As indicated above, Carvel's argument that it would be impractical to offer specifications to a number of suppliers and thereby, provide a competitive marketplace for the franchise dealers is rebutted by the fact that Carvel does license a number of dairies to supply mix, and a number of cone manufacturers to supply cones to Carvel dealers. The Carvel dealers, however, are required to purchase these products through Carvel and not from the dairy supplying the mix or the manufacturer of the cones. The dealer, because he is tied to Carvel, cannot negotiate price directly with the local dairy which manufactures the mix, although this dairy receives orders directly from the dealer and delivers mix directly to the dealer. This situation applies to suppliers of cones and other products. Carvel's arrangements with the suppliers permit Carvel to fix the price at which the dealer must order these products from the dairy, cone and other suppliers. As the middle-

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* Lanham Act, Section 33(b) (7), 60 Stat. 427 (1946), as amended 15 U.S.C. Secs. 1051-1127 (Supp. V. 1964) specifically allows as a defense in an infringement action, the fact that plaintiff violated the antitrust laws. The intent of Congress that the trademark licensing provisions would not supersede antitrust proscriptions is clear. See 92 Cong. Rec. 7636, 7872-74 (1946) (remarks of Senator O'Mahoney). "But it is of such great importance to the public of the United States that restraints of trade shall not be permitted, that the Senate insered [sic] this amendment. . . ." Id. at 7873. See also H. R. Rep. 219, 79th Cong. 1st Sess. 3 (1945); S. Rep. No. 1333, 79th Cong., 2d Sess. 3 (1946), and *Quality Control and the Antitrust Laws in Trademark Licensing*, 72 Yale L.J. 1171, 1202 (1963).

man, Carvel assures itself a profit on the transaction, and the supplier is assured a profitable and stable market.

Carvel suppliers knowingly benefit from the tying arrangement imposed by Carvel on its franchise dealers. Thus, Martin Cain, sales manager of Eagle Cone, a respondent herein, candidly acknowledged that its arrangement with Carvel, whereby Eagle supplied all cones to franchise dealers in Massachusetts, Connecticut and New York, in addition to being advantageous to Carvel, "was also advantageous to Eagle because it assured a stable market [guaranteed by the tying arrangement] for it to sell."* Mr. Cain, in complete candor, stated that this stable market "was especially attractive to Eagle because of the fierce competitive nature of the cone industry where orders are given on an 'as-needed' basis." Mr. Cain further observed that Eagle's arrangement with Carvel was "unique in the industry" since "[v]ery few, if any, of Eagle's fifteen major competitors who supply the above described tri-state area have such contracts with their customers" (R. 115). Thus, while Carvel and Eagle enjoy a stable market guaranteed by the tying arrangement, the Carvel dealer is permanently restrained from securing the advantages available to buyers in a "fiercely competitive" market.

Carvel has argued that it is entitled to use tying arrangements in order to protect its reputation. Unlike the franchise dealer, Carvel has no difficulty in distributing specifications, and in securing competitive prices for products which it requires. Carvel would not hesitate to buy from the seller who quotes the lowest price for a product meeting its specifications, and it does not commit itself to buy exclusively from one supplier for any duration. In short,

* Eagle also transacts business in New Jersey and Pennsylvania, and could supply cones in these states to Carvel dealers, but is precluded from doing so by its arrangement with Carvel.

Carvel is not willing to relinquish the benefits to be derived from a competitive market. The threat to Carvel's reputation does not arise until the franchised dealer asks for the same right which Carvel accords itself. Only at this point does it become impractical to make available specifications for products, and to make certain that the specifications are followed.

The record in this case convincingly establishes that the tying arrangement which Carvel imposes upon its dealers is motivated by a desire to isolate the dealers from the marketplace and thus, to channel to Carvel, substantial purchases of tied-in products. This tying arrangement has that effect on competition which has always been of significant concern to this Court. Suppliers are foreclosed from competing with Carvel in selling to its dealers, and the franchised dealers, as independent businessmen, are denied those advantages historically attributed to such competition.

Respectfully submitted,

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Petitioners,

—against—

CARVEL CORPORATION, *et al.*,

Respondents.

ANSWERING BRIEF FOR THE CARVEL RESPONDENTS

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ANSWERING BRIEF FOR THE CARVEL RESPONDENTS

Petitioners' reply brief, although limited to one issue, is fundamentally defective. Petitioners now confine their argument to the sole issue of whether the concurrent findings of the lower courts that unlawful tying agreements are not present in this case, are clearly erroneous. We avail ourselves of the privilege of filing an answer for the purpose of showing the basic infirmities of petitioners' argument on this single issue which they characterize as "paramount in this case."

ARGUMENT

1. Petitioners wrongly assume that an initial decision by a hearing examiner in another case, on another record, is of any use or cogency on this appeal.

Petitioners refer to a case brought in 1964 by the Federal Trade Commission under § 5 of the Federal Trade Commission Act against a number of the Carvel corpora-

tions (and the individuals who are their principal officers). That case is now *sub judice* before the Commission on cross appeals from the initial decision of the hearing examiner, dated May 25, 1964, by Carvel and the "complaint" counsel of the Commission. Petitioners rely on that part of the initial decision which finds that the tying product is the Carvel franchise, and that the dealers are unlawfully required to purchase from Carvel "... the tied product, particularly freezers, mix, cones and commissary items." (Initial Decision (I.D.) ¶ 60, p. 21)

The hearing examiner stated that he was "not unmindful" of the decision by the United States Court of Appeals for the Second Circuit in this (the *Susser*) case. He made no attempt, however, to distinguish that decision beyond stating his view "... that the legal issues before the Court were different from those here presented, and that the Court was dealing with facts which were different in material respects from the facts in this record." (I.D. ¶ 106, pp. 34-35) The initial decision concludes its reference to the opinion in this case by the court below, saying:

> "This [initial] decision has been made on the basis of the issues and facts presented in this record, without extending it by a detailed discussion to distinguish them from those which were before the Court." * (*id.* p. 35)

* In Carvel's appeal to the Federal Trade Commission argued on November 18, 1964 (and not yet decided), we urged that the analysis of the nature and effect of the Carvel franchise agreement and the reasoning of the courts below in this case provide adequate guide lines for the decision by the Commission in favor of Carvel notwithstanding the differences in the records.

Under the Commission's Rules of Practice (§ 3.21) a timely appeal from an initial decision deprives it as well as the order recommended by the hearing examiner of all force and effect.

That the concurrent findings of the lower courts deserve to be discarded in favor of the adoption by this Court of the contrary findings, analysis and reasoning of the hearing examiner in the other case, is the altogether untenable position of petitioners' reply brief.

2. Petitioners' premise that the purchase requirements of the Carvel franchise agreements are co-extensive with all the products that the dealer needs to buy, is plainly wrong.

Petitioners contend that the Carvel dealer is required "to buy practically all of his commissary items, supplies and equipment from Carvel" (Reply Brief, p. 2). On this assumption, petitioners refer to the dollar total of Carvel sales in 1960 of mix, other ingredients and supplies and equipment as ". . . tied-in gross sales by Carvel to its franchise dealers in the five state market . . ." (*id.* p. 4)

These factual contentions of petitioners are in clear and direct contradiction of the evidence in this case. The parties stipulated (R. 30) that the area of greatest concentration of Carvel sales was in the states of New York, New Jersey, Pennsylvania, Connecticut and Massachusetts. The amount of Carvel annual sales was also stipulated (R. 27). However, the stipulated annual sales, including those for the year 1960 to which petitioners specifically refer, cover sales not only within the five state area, as petitioners wrongly assert, but the sale to all Carvel retail outlets which, as the Court of Appeals found, are ". . . located throughout the eastern portion of the United States from Maine to Florida and as far west as Wisconsin" (R. 434).

It was further noted by the Court below that two-thirds of the gross sales by Carvel ". . . constitute sales of the Carvel secret formula mix which surely could legally be tied to the Carvel trade-mark if that mark was to retain its significance, as he [Chief Judge Lumbard] concedes" (R. 451, fn. 2).

Petitioners further wrongly contend that the dealers are required to purchase from Carvel their requirements of all other ingredients and supplies and equipment. The uncontradicted evidence in this record is that the dealers are required under the franchise agreement to purchase from Carvel only those articles, principally ice cream mix, which are part of the ice cream end products offered for sale to the public under the Carvel trademark (R. 434; Our Main Brief, pp. 13, 16, 17, 32-33, 59, also Appendix "A", pp. 1a, 2a-3a).

The court below found that the figures representing total annual sales by Carvel ". . . shed no light on the amount of 'tied sales' here complained of, which common sense tells us must be a minor part" (R. 451). As an illustration of "insubstantiality" of the commerce affected, the Court points out that the 1960 sales of other ingredients and supplies of $1,354,599 (referred to in the Reply Brief, p. 4), represent "an average of less than $3,400 per dealer per year; the record does not make it clear whether all these 'ingredients' were tied" (R. 451, fn. 2).

It is true that petitioners made no attempt at the trial to differentiate between the ingredients which were incorporated as part of the end product sold to the public under the Carvel trademark and those that were not. What the record does show is that the total sales of ingredients and

supplies (which in 1960 reached the total mentioned of $1,354,599) embrace over 500 separate items. Of these, some seventy are, when used, made part of the end product and are required under the franchise agreement to be purchased from Carvel (Pl. Ex. 8-A, § H, Supply List No. 1, 6 and 10; among the exhibits designated and brought to the court). Accordingly, the average sales of ingredients and supplies of less than $3,400 per dealer per year is necessarily considerably less when limited to the seventy essential ingredients and supplies.

While the dealer is required to purchase such of the ingredients and supplies as are components of the end product, no such requirement applies to any equipment which a dealer desires to purchase (R. 208, 212-213, Pl. Ex. 1, ¶ Ninth, 3148). There is abundant evidence in the record that the dealers frequently exercise their right to purchase equipment from non-Carvel sources. (Our Main Brief, pp. 24-25, App. A, 1a.) These instances involved clearance with Carvel that such equipment was consistent with Carvel standards. The claim repeatedly made by petitioners that the Carvel manual did not include specifications of equipment (Their Main Brief, pp. 21, 22, 23) is untrue. Page after page of the manual sets out standards and specifications for minor as well as important pieces of equipment (Pl. Ex. 8-A, § M, pp. 1-8, 13-16).

That there is no basis for regarding equipment as one of the tied products is confirmed by the absence of any reference in any of the opinions by the courts below to equipment as a "tied" product. Equipment is mentioned in another context, namely, that under the circumstances of this case, the equipment (whether patented or unpatented),

in the Carvel outlets cannot be considered as a "tying" product (R. 56, R. 452; Our Main Brief, pp. 23, 24, 53-54). It is worth noting that petitioners' main brief and reply brief take altogether different positions with respect to equipment. Their first brief contends that Carvel equipment is a tying product (Their Main Brief, pp. 12, 14, 22, 24), a contention rejected by the trial court (R. 56) and by the Court of Appeals (R. 452). Their reply brief shifts to the contention that equipment is one of the tied products (Reply Brief, pp. 2, 4, 5) in complete disregard of the evidence already referred to that the restrictions of the franchise agreement did not apply to equipment, and that the dealers acted accordingly.

While petitioners regard the issue of illicit tying as paramount, they nevertheless do not attempt in their reply brief to deal with the fundamentals of the subject. They fail to answer our argument documented by references to the record, the findings of the courts below and the pertinent decisions, that the factual prerequisites for illegal tying arrangements are absent from the Carvel franchise system (Our Main Brief, pp. 45-61, 62-69). Nor do they attempt to answer our argument that Carvel did not, in the context of the proof in this record, exceed what the law authorizes, permits or expects of an owner of trade secrets and trademarks in contractual arrangements with licensees (*id.*, pp. 70-92).

Petitioners concentrate rather upon an attempt to enlarge the impact upon commerce of the Carvel business. This desire to exaggerate manifests itself, as already shown, in their argument that the franchise agreement makes it mandatory for dealers to buy practically all their needs

from Carvel, a position wholly at variance with the evidence in this case and the findings of the courts based thereon. Petitioners rely on other distortions to magnify the putative economic power of Carvel in the ice cream business.

Petitioners refer to a claim in a Carvel advertisement that the Carvel outlets in a period of twenty-one years served over ten million customers (R. 427) involving, as petitioners prefer to say, three billion individual servings by retailers who, during the twenty-one year period, grossed over three hundred million dollars (Reply Brief, p. 6). This contrasts with the petitioners acceptance in the trial court of a stipulation that the annual sales by Carvel retailers was between six and eight million dollars (R. 29; this was part of a pre-trial stipulation dealing with other matters as well, Tr. 3419).

Multiplication of annual sales and servings to customers by the span of twenty-one years may yield figures that look astronomical but hardly represents evidence of economic power in the context of the antitrust laws. The figures do show a rather consistent consumer acceptance of the ice cream products sold under the Carvel trademark. Undoubtedly, the reputation of the franchising organization and the performance of existing franchised dealers would be considered by anyone desiring to enter the ice cream business and become part of the Carvel chain. This, however, is a far cry from the intimation in the reply brief (p. 6) that communication of the extent of consumer acceptance of the Carvel products operates to coerce entry into the Carvel franchise agreement. Petitioners' reply brief does not contend—nor would the record justify the argument—that the applicant for a dealership is confronted with buy-

ing requirements after he becomes a Carvel dealer which differ from those set forth in his franchise agreement. Thus, the circumstances of this case are essentially different from the gasoline cases where subsequent "salesmanship" influences a dealer to purchase sponsored T.B.A. products, not mentioned in the dealership contract. Furthermore, the required purchase of essential components of the ice cream products sold under the Carvel trademark is altogether different from tying to the sale of gasoline the purchase of unrelated T.B.A. products (Our Main Brief, pp. 55-59).

Predatory motives are attributed to Carvel in petitioners' reply brief, undocumented and in fact contradicted by substantial evidence. It was found below that the restrictive clauses of the Carvel franchise ". . . are aimed primarily at control of quality and are not part of a design by Carvel to monopolize business in any of these fields" (R. 62, 453). No showing has been made why these and related findings by the lower courts should be regarded as clearly erroneous.

It is strange indeed that petitioners' reply brief should now speculate about the motivation of dealers for entering into the Carvel franchise agreement. Inference and argument cannot overcome the failure of any of the petitioners to testify or to call other Carvel dealers or ex-dealers to testify at the antitrust trial. If any widespread grievance based on the pinch of so-called tying requirements really existed, the aggrieved would not shun the witness stand; nor would their trial lawyer dodge production of witnesses, especially clients, so readily available and normally eager to tell their story. The trial court informed petitioners' counsel that: "You could have produced all the live witnesses you wanted" (Our Main Brief, p. 84).

The absence of any dealer testimony relating to the alleged tying agreements and their operation, is actually fully consistent with the absence of any reliance in the complaints upon claims of improper tie-ins. We have already shown that none of the complaints of petitioners filed between September 1959 and May 1960 stated a claim based on illegal tying requirements (Our Main Brief, pp. 10, 6-9). There is an air of unreality about petitioners now advancing as paramount in this case, claims which were not asserted in the petitioners' complaints and about which petitioners did not give or produce any testimony. No less unreal is the argument that Carvel seeks for its own gain "to isolate the dealers from the market place" in the light of another argument which acknowledges that the average dealer, "displaying the Carvel trademark" invests "approximately $10,500" and "grosses $40,000, nets $13,000" (Reply Brief, cf. pp. 10 and 6).

3. Petitioners' schedules and calculations of Carvel's share in the five state market area are misleading, inaccurate and wholly unreliable.

Petitioners' reply brief (p. 5) takes the liberty of changing the description of Carvel defendants' Exhibit C-9 (R. 315) in substantial manner. They interpose the word "soft" before the term "ice cream mix". In point of fact Exhibit C-9 is a "schedule of gallonage of total Carvel ice cream mix sold by the Carvel corporate defendants" in the five state area from 1953 to 1960. Petitioners never sought to establish that the product line involved is soft ice cream or that the chief ingredient could accurately be designated soft ice cream mix. On the contrary, the complaint "sub-

mitted as typical" (R. 137) refers to the products sold under the Carvel name as "ice cream and allied products" (R. 139). Moreover, the franchise agreement itself refers throughout only to "Carvel's Frozen Dairy Product", and recites the new dealer's desire to produce and sell the same in accordance with the provisions of the SOP (Pl. Ex. 1, Preamble, ¶¶ "2", "3", "Fourth", "Sixth", "Seventh" and "Eighth", R. 208, 209, 211-12). Indeed, petitioners stipulated (R. 178-179) that what the dairy delivered on behalf of Carvel to its dealers was ice cream mix, which is first processed to obtain soft ice cream and subsequently frozen to obtain hard ice cream.

The undisputed testimony of a dairy manager amplifies this stipulation. He confirms that his dairy makes a special Carvel mix according to secret formula supplied by Carvel. The tag attached by the dairy to the cans of mix shipped to the dealers describes their contents only as "Ice Cream Mix" (Def. Ex. H-4, R. 325, 3553). This Carvel mix is used to make the soft serve product as well as the take-home products which consist of hard ice cream frozen to five or ten degrees below zero, and packaged in pints or quarts (R. 191-192).* Petitioners' belated insistence that Carvel's mix is a "soft" ice cream mix and that its product line is "soft" ice cream merits no attention here because the point was not raised at the trial or in petitioners' previous briefs.

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* Extensive documentary proof establishes that Carvel dealers sell a full line of both soft and hard ice cream, hardened novelties and ices. Pl. Ex. 8-A, § H, Supply List No. 10; § J pp. 12, 13, 14, 15, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59; Def. Ex. C-8, R. 426, 3482.

Defendants' Exhibit C-10 consisting of the statistical reports of the United States Department of Agriculture for the years 1953 through 1960, were received in evidence following a precise identification of the tables and figures for which they were offered, namely, "the total gallonage production of frozen dairy products for each of the five states mentioned" (R. 156). At first, petitioners' counsel objected to the admission in evidence of these officially published government statistics on the grounds that their publication by a government agency "does not authenticate them" and on the further ground that on his theory of the case no economic data was relevant (Tr. 3498).

The additional Exhibits C-11 and C-12 (R. 317-319) compared the government figures for the production of frozen dairy products with the sales in corresponding areas and years of Carvel ice cream mix. They were admitted in evidence subject to verification by petitioners' counsel (R. 157). After Mr. Rothstein, counsel for petitioners, inspected Exhibits C-10, C-11 and C-12, he made an observation not an objection, as the following colloquy reveals (Tr. 3605-6):

> "Mr. Rothstein: We have one loose end here we may as well tie up with reference to the exhibits introduced by Mr. Weisman on the figures and computations based on the Department of Agriculture publications. I just want to make this observation on it:
>
> "Those Department of Agriculture publications, and of course Mr. Weisman's computations based on them, refer only to ice cream mix with no demarcation as between soft and hard ice cream.
>
> "The Court: I understand that.
>
> "Mr. Rothstein: We are in the soft ice cream business.

"The Court: I understand also some of the places do double-freeze this and sell hard ice cream."

Petitioners' reply brief now criticizes the use for comparison purposes of statistics concerning the production of frozen dairy products (Reply Brief, p. 5, fn.). We submit that the end products sold under the Carvel name fairly fall within the category of frozen dairy products because the regular practice of the Carvel dealers is to make and sell the hard ice cream in customary form as well as the novelty dessert products bearing individual and "glamorous names" (R. 179), numerous enough to earn the characterization of a "picturesque list" (R. 193). Let us assume *arguendo* that the criticism of the use of frozen dairy products as the basis for comparison has some justification. The alternative on this record is not to restrict the comparison to one between the Carvel special formula mix, wrongly characterized as soft ice cream mix, and sales of soft ice cream only, as though this was the only product sold under the Carvel name. Yet, this is exactly the comparison which petitioners' reply brief advances for the selected year 1959 (Reply Brief, p. 5).

The proper alternative on this record—if any alternative is required—is a comparison between the gallonage of Carvel's special formula mix with the government figures concerning the production of ice cream mix. [Incidentally, the federal standards of identity promulgated by the Food and Drug Administration do not define and make no reference to "soft ice cream mix", the term introduced by petitioners' reply brief; the definition and specification of standards relate only to "ice cream mix". See 26 F.R. 11676.]

Comparison made on the proper basis, i.e. between sales of Carvel ice cream mix and the state-wide production of ice cream mix, dramatically demonstrates that the table and calculations of petitioners' reply brief (p. 5) are wholly misleading and unreliable.

	"Schedule of Gallonage of Total Carvel Ice Cream Mix sold by the Carvel Corporate Defendants in . . ." (R. 315, Ex. C-9)(a)	1959 Total State Production of "Ice Cream Mix" as reported by United States Department of Agriculture (R. 156, Ex. C-10)	Percentage of Column (1) to (2)
Conn.	143,340	5,264,000(b)	2.72
Mass.	24,380	14,676,000(c)	0.166
Pa.	159,920	42,212,000(d)	0.378
N.J.	347,000	10,469,000(e)	3.314
N.Y.	1,190,920	41,087,000(f)	2.899

We see no need for printing similar schedules for the years 1953-1958 and 1960. We prepared them and represent that Carvel's percentage share of ice cream mix sold in the five states is substantially the same as in 1959. The Carvel share ranges in all those years from a low of less than one-fifth of one percent to a high not exceeding three and one-third percent. The shift from frozen dairy products to ice cream mix as the ba is of calculating Carvel's

(a) These figures, to which no objection was made, were taken from the Carvel books and records.

(b) Table 10 fourth line from bottom of page 23 of U.S. Department of Agriculture Bulletin, 1959 Production of Manufactured Dairy Products, published August 1960.

(c) id., Table 10, fourth line from the bottom of page 26.

(d) id., Table 10, fourth line from the bottom of page 30.

(e) id., Table 10, fourth line from the bottom of page 28.

(f) id., Table 10, fourth line from the bottom of page 29.

market share of the chief ingredient does not result in any significant increase over the lower percentage shown by the original exhibits, namely, between one and two per cent (Our Main Brief, pp. 97, 68).

Petitioners argue about foreclosure of competition in the suppliers' market while entirely ignoring the finding by the Court of Appeals that suppliers of mix and other ingredients can compete to obtain supply contracts from Carvel on a year to year basis (R. 452). This finding is fortified by the concession in the minority opinion that by the nature of things such competition is "vigorous" at least among suppliers who are qualified to meet "Carvel's price and service demands" (R. 443). Moreover petitioners "failed to prove that they were foreclosed from alternate sources of supply" (R. 449). Likewise, their reply brief is barren of any attempt to refute the findings that in the area of the greatest concentration of stores, New York, Connecticut and Massachusetts, where two hundred and fifty out of the total of four hundred Carvel outlets are located, there is a total of 125,000 retail vendors of ice cream. This leads to the finding that Carvel outlets amount ". . . to one-fifth of one percent of the outlets and apparently doing about one percent of the business" (R. 451). These figures are found in one of petitioners' exhibits (Pls. Ex. 24, R. 113, 3245).

No challenge is offered in the reply brief to the findings that ". . . the facts . . . showed neither that Carvel had 'sufficient economic power with respect to the tying product to appreciably restrain free competition in the market for the tied product' nor that 'a not insubstantial amount of commerce is affected'. Indeed, such figures as exist would

prove the contrary" (R. 450-451). Petitioners are content merely to name the very cases (p. 6) containing the standards which the Court of Appeals deemed appropriate to apply to the findings of fact on the evidence in this case. These findings in both courts below are adverse to petitioners' claims as well as to their past and present contentions. Nothing has been shown as a basis for finding clear error by the trial or appellate courts.

4. Petitioners' reply brief misconceives the nature of the Carvel franchise system.

Petitioners' reply brief argues as though an applicant for a Carvel franchise is interested in entering the retail food business and in obtaining the right to display the Carvel trademark in connection with sales of ice cream (Reply Brief, p. 1); and that for such privilege plus "Carvel's expert supervision and guidance" the applicant "is willing to pay a royalty to Carvel" (*id.* p. 2). But since Carvel couples the royalty for use of its trademarks, supervision and marketing guidance with a commitment to purchase certain products from Carvel—so their argument goes—the "franchise applicant has but one choice", to enter into the Carvel franchise agreement (*id.*). Absurd!

This is not argument on, but removed from the facts in the record. This contention has no bearing on the true relationship between Carvel and a prospective dealer who is free to choose among many available ice cream franchising organizations, including those with less exacting standards than Carvel's (R. 451, 454). Nor does such argumentation accurately reflect the relationship subsequent to the execution of the franchise agreement. Petitioners sedulously avoid the findings of the trial court and a unani-

mous Court of Appeals that Carvel may lawfully: (i) exclude association of non-Carvel products with the Carvel trademark (R. 448, 60-63), (ii) insist that the retail outlets be "uniform in appearance and operation" and offer the public "identical products at a uniform standard of quality" (R. 448, R. 62), and (iii) require the sole use of the trademarked items (*id.*).

Petitioners argue that the factors of stability of supply and continuity of customer relationship are indicia of inevitable illegality of total requirements and exclusive dealing provisions (Reply Brief, p. 8, 9). This is directly contrary to the conclusions of the court below (R. 446) with no disclosure of the basis for claiming clear error.

We come now to the treatment in petitioners' reply brief of the justification for maintaining, by restrictive franchise provisions, the secrecy of Carvel's special formulae for mix and other essential components which become part of the end products sold under the Carvel trademark.

The reply brief does not reach this question of justification in the context in which the courts below considered it. The trial court evaluated the evidence bearing on justification and found it sufficient and necessary to protect Carvel's business and good will; it found, relatedly, that there was sufficient evidence to show that such protection could not be achieved by making the secret and special specifications available to suppliers in the market or to the dealers themselves, and also that if these specifications were released, supervision and policing of quality and uniformity would impose an impracticable burden on Carvel (R. 59). The Court of Appeals found no reason for disturbing these findings and made confirmatory findings of its own (R. 453-454).

The reply brief does not endeavor by analysis of the record to show error by the courts below in making these findings and conclusions, or to refute our argument (Our Main Brief, pp. 81-92) that such findings and conclusions, far from being clearly erroneous, are supported by substantial evidence. Petitioners merely adopt the directly opposite view of the hearing examiner in the Federal Trade Commission case (Reply Brief, pp. 7-8). Their argument is nothing more than a distillation of his reasoning. They, like he, are indifferent to the sacrifice of special formulae and good will, valuable to the dealers as well as to Carvel (Our Main Brief, pp. 89-91). Petitioners argue as though his mere expression of the view that Carvel's business and good will can be protected through publication of specifications, is sufficient ground to discard as clearly erroneous the directly contrary findings and conclusions of the trial court and of the Court of Appeals.

It is nothing short of remarkable that petitioners eschew mention of the dissent of Chief Judge Lumbard, who did not go along with the majority's finding that Carvel need not publish specifications of its secret formulae to avoid loss thereof and injury to its good will. Perhaps petitioners shunned reference to the dissent because Chief Judge Lumbard's dissatisfaction with the sufficiency of the evidence of justification led him to recommend ". . . remand [of] the cause to the district court for further hearing limited to the issue of justification", a flexible resolution of the problem precipitated by his dissent; contemplating that: "If Carvel could establish its claim the result ultimately would be the same" (R. 446), i.e., in accord with the majority. Evidently petitioners preferred the inflexible conclusion of the hearing examiner, on a fee-

ord which he regarded as materially different from the record in this case, because he excludes the concept that Carvel's preservation of the secrecy of its formulae could ever be legally justified.

The reply brief does not begin to come to grips with petitioners' obligation to show on the evidence in this record that the courts below were clearly in error. The Court of Appeals found that: (a) The Carvel dealers suffered no economic damage by compliance with the requirement to purchase essential ingredients from Carvel (R. 52) or at worst, inconsequential damage (R. 51) of trivial scope (R. 53); (b) to compel Carvel to limit itself to advance specifications of standards for essential commodities covered by the purchase requirements of the franchise agreement, would impose an impractical and unreasonable burden of formulation, and the record affords no sufficient basis for upsetting the trial court's finding to this effect (R. 453); (c) there is no basis for rejecting as insufficient the testimony which the trial court regarded as reasonable and persuasive, to the effect that it was impracticable to handle the problem of assuring uniformity and quality of the products sold under the Carvel trademark by specification and policing (*id.*); (d) there is a limit to the amount of inspection which is feasible with relation to finished trademark products sold in ten and twenty cent units by numerous and scattered dealers whose annual purchases from Carvel, including equipment, total less than $12,000 a year per outlet (R. 454); (e) Carvel's ability to furnish specifications to its own source of supply whose product is regularly checked, does not show that administration could be entrusted to four hundred dealers (R. 453); and (f) the circumstance

that a competing franchising organization, which licenses only freezing machines under trademark and does not sell a special mix made to a secret formula, is satisfied with less exacting standards and can furnish suppliers with specifications, provides little force to the proposition that Carvel should be compelled to furnish for the suppliers' market its special formulae specifications, reflecting more exacting standards (R. 454).

That the findings of the court below just summarized, affirming similar findings by the trial court, are rooted in substantial, uncontradicted and unimpeached testimony and evidence in this record, is abundantly clear (R. 203, 41, 181; 182, 190, 191, 197-199; Our Main Brief, pp. 81-92). Equally apparent is the conclusion that the main brief filed on behalf of all the petitioners as well as the reply brief filed only on behalf of some of them,* did not, because

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* After Sidney W. Rothstein, Esq., attorney for the petitioners, failed to appear for the oral argument of this case, this Court entered an order to show cause returnable March 25, 1965, why the writ in this proceeding should not be dismissed for want of prosecution. We are informed that this order to show cause was transmitted to all of the petitioners at their last known addresses as well as to their counsel.

On March 29, 1965, this Court entered an order discharging the order to show cause and restoring the case to the calendar for argument on Thursday, April 29, 1965. The return on the order to show cause filed by Arnold Fleischmann, Esq., as attorney for those petitioners who retained him after discharging Mr. Rothstein, discloses among other things, that petitioners James and Elizabeth G. Ossola, and Matthew and Jane L. Seu, were then expected to authorize Mr. Fleischmann to appear for, and represent them in this case. The reply brief (p. 10) discloses that the Ossola and Seu petitioners apparently failed to retain counsel to replace Sidney W. Rothstein, Esq. who has abandoned the matter. It would seem that those petitioners who failed to make any return on the order to show cause, have abandoned their respective appeals. (This would also apply to petitioners Susser, Mueller and Frederick in whose appeals the Carvel respondents are not parties.)

they could not make a showing that the concurrent findings of the courts below are clearly erroneous.

CONCLUSION

The judgments below should be affirmed.

Respectfully submitted,

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